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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Argued and Submitted Oct. 21, 1981

Decided March 28, 1983

No. 80-4368

Frank E. MIDKIFF, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki and Myron B. Thompson, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs-Appellants,

—v.—

Paul A. TOM, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority; Franklin Y.K. Sunn, Executive Director of the Hawaii Housing Authority; and Hawaii Housing Authority,

Defendants-Appellees,

—and—

Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.; Kamiloiki Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/Lease Conversion

Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund and Halawa Valley Estates Fee Conversion Corporation,

Intervenors-Appellees.

Appeal from the United States District Court for the District of Hawaii.

Before:

ALARCON, POOLE and FERGUSON,
Circuit Judges.

ALARCON, *Circuit Judge:*

The question presented by this case is whether a state may take real property from a lessor and transfer title in fee simple absolute to a lessee because of a shortage of land for fee simple residential ownership.[1] We hold that such a taking violates the federal constitution.

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1 Federal district court jurisdiction of the case sub judice is based upon 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights) & 2201 (declaratory relief) and 42 U.S.C. § 1983 (civil action for deprivation of rights). The issue of whether the district court should abstain from the exercise of its jurisdiction was raised during the proceedings below. The district court proceeded to the merits and thus implicitly exercised its discretion to decline abstention. *See Midkiff v. Tom*, 483 F.Supp. 62 (D.Haw. 1979).

The general rule is that a federal court must decide the cases properly before it; abstention from the exercise of jurisdiction is the exception to the

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On February 19, 1979, the Trustees of the Kamehameha Schools/Bishop Estate [Bishop Estate] filed a declaratory relief

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rule. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380, 1385 (9th Cir. 1981). "[T]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy." *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n. 5, 98 S.Ct. 673, 677-678 n. 5, 54 L.Ed.2d 618 (1978). This court will reverse the district court on the issue of abstention only where there has been an abuse of discretion. *Shamrock Dev. Co.*, 656 F.2d at 1385.

There are several bases upon which a federal court may abstain from exercising its jurisdiction. *See International Bhd. of Elec. Workers, Local Union No. 1245 v. Public Serv. Comm'n*, 614 F.2d 206, 211-12 (9th Cir. 1980) [*International Bhd*]. A federal court may decide to abstain, for example, where a federal constitutional issue could be "mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959) (citing inter alia *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941)). This court has held that abstention based upon this doctrine (*Pullman* abstention) is required if three tests are met:

> (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
>
> (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."
>
> (3) The possibility determinative issue of state law is doubtful.

Canton v. Spokane School Dist. # 81, 498 F.2d 840, 845 (9th Cir. 1974) (citing *Pullman*, 312 U.S. at 498-99, 61 S.Ct. at 644-645) (footnote omitted). A state's system of eminent domain "is intimately involved with sovereign prerogative," *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (upholding district court's exercise of discretion resulting in abstention), however, this alone is insufficient to require abstention. *Frank Mashuda Co.*, 360 U.S. at 191-92, 79 S.Ct. at 1064-1065; *see Zablocki*, 434 U.S. at 379-80 n. 5, 98 S.Ct. at 677-678 n. 5 (1978); *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980). It is especially crucial that there be "an uncertain issue of state law." *Id.* at 78. The Hawaii Land Reform Act is perfectly clear as to the key issue of whether the condemnation system set forth in Hawaii Rev.Stat. ch. 516 is for a public use. The statute unambiguously states: "The use of the power to eminent domain [under the Hawaii Land Reform Act]

action alleging that the Hawaii Land Reform Act, Hawaii Rev.Stat. ch. 516, was unconstitutional. The Commissioners and the Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority were named as defendants

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. . . is for a public use and purpose." Hawaii Rev.Stat. § 516-83(a)(12). Moreover, there is no fair construction of this provision that would moot the federal issue of whether the condemnation is for a public use. "Hence, the naked question, uncomplicated by an unresolved state law, is whether the Act on its face is unconstitutional." *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971). Abstention by the district court thus would have been inappropriate.

Federal courts may also decline to exercise their jurisdiction where the dispute involves "an essentially local issue arising out of a complicated state regulatory scheme . . . ." *International Bhd.*, 614 F.2d at 211. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The Ninth Circuit has limited abstention under this principle (*Burford* abstention) to cases where: (1) the state has concentrated suits involving the local issue in a particular court; and (2) the federal issues are not easily separable from state law issues with which the state courts may have special competence. *See International Bhd.*, 614 F.2d at 211. Hawaii has not concentrated challenges to its condemnation system in any court. The federal issue of whether the takings provided for by the state legislature is for a public use is easily separable from any state law issues especially since the statute is clear. *Burford* abstention is thus inapplicable.

Finally, abstention by a federal district court is appropriate under the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* and its progeny counsel federal court abstention when there is a pending or ongoing state proceeding, *Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979); *L.H. v. Jamieson*, 643 F.2d 1351, 1352 (9th Cir. 1981), in which the federal claims could be competently adjudicated. *See Moore*, 442 U.S. at 425, 99 S.Ct. at 2378. The Supreme Court recently reiterated that abstention under *Younger* principle is limited to federal cases which "seek to enjoin state judicial proceedings. . . ." *Fair Assessment in Real Estate Ass'n Inc. v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 185, 70 L.Ed.2d 271 (1981). *See Zablocki*, 434 U.S. at 379-80 n. 5, 98 S.Ct. at 677-678 n. 5. Plaintiffs in this action have not sought to enjoin any state judicial proceedings. We are informed by counsel on both sides of the abstention issue that, as of the time this action was filed, no condemnation actions had been filed in the state courts. This fact is undisputed. Moreover, even though such suits may now be pending in the state courts, the "principles of comity and federalism *do not require* that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." *Town of Lockport, N.Y. v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n. 8; 97 S.Ct. 1047, 1051 n. 8, 51 L.Ed.2d 313 (1977) (emphasis added). The district court acted correctly in declining to abstain from the exercise of its jurisdiction.

[original defendants and intervenors hereinafter Appellees]. The district court declared that the challenged statute before us was constitutional. *Midkiff v. Tom*, 483 F.Supp. 62, 70 (D.Haw. 1979). This appeal followed.

The Hawaii Land Reform Act permits certain lessees in possession of land in that state to acquire title in fee simple absolute through eminent domain proceedings. This legislation was enacted after a determination by the Hawaii Legislature that land ownership is concentrated in a few persons who have chosen to lease their property rather than to sell it. The legislature found that this practice has resulted in a shortage of fee simple land and an artificial inflation of residential land values in the state.

We must decide whether the Federal Constitution permits a state to take the private property of *A* and transfer its ownership to *B* for his private use and benefit. It is our view that it was the intention of the framers of the Constitution and the fifth amendment that this form of majoritarian tyranny should not occur. The protection provided by the fifth amendment has been extended to the states by reason of the fourteenth amendment. *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896).

II

As originally drafted, the Federal Constitution contained no reference to the protection of private property interests. It is quite clear, however, that prior to the founding of this nation, it was well established that the government could not take private property except for the use of the public. Hugo Grotius, one of the first commentators to define eminent domain, articulated a "public advantage" as a necessary prerequisite to a taking by the state. 2 H. Grotius, De Jure Belli Ac Pacis 385 (F. Kelly trans. London 1925) (1st ed. Amsterdam 1646). In 1758, E. de Vattel wrote that the exercise of the power of eminent domain had to be for the "public welfare." E. de

Vattel, The Law of Nations, 96 (C. Fenwick trans. 1916) (1st ed. 1758). S. Pufendorf stated that a government taking must be for the "necessities of the state." De Jure Naturae et Gentium 1285 (C. & W. Oldfather trans. London 1934) (1st ed. 1688).

III

The failure to spell out a precise guarantee for the protection of life, liberty, and property interests in the body of the United States Constitution was deliberate. James Madison, considered by historians to be the Father of the Constitution,[2] explained the reasons for this conscious omission as follows:

> My own opinion has always been in favor of a bill of rights . . . . At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. . . . I have not viewed it in an important light—1. because . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. . . . 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. . . .

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 The Writings of James Madison 271-72 (G. Hunt ed. 1904).

Madison was, however, keenly mindful of the need to create a form of government which would protect each person's

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2 United States Constitutional Sequicentennial Comm'n, History of the Formation of the Union Under the Constitution 122 (1941).

property interests. He stated this concern eloquently at the constitutional convention. "In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation; in which case, the rights of property & the public liberty, [will not be secure in their hands]. . . ." 2 The Records of the Federal Convention of 1787 203-04 (M. Farrand ed. 1911) (footnotes omitted).[3]

In 1787 Madison expressed his views to Thomas Jefferson concerning the need to protect minority rights from the acts of a majority that might seek to remedy unequal property distribution through legislative action:

> [N]o society ever did or can consist of [a] . . . homogeneous . . . mass of Citizens. . . . In all civilized societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest. . . . [These distinctions will produce dissention and faction.] However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind . . . will continue to view them in a different light. It remains then to be enquired whether a majority having any common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority.

Letter from James Madison to Thomas Jefferson (Oct. 14, 1787), *reprinted in* 5 The Writings of James Madison 29.

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3 Madison also articulated this concept earlier during the constitutional convention: "The lesson we are to draw . . . is that where majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure." 1 The Records of the Federal Convention of 1787, 136 (M. Farrand ed. 1911).

Madison's distrust of government according to the will of a majority of the electorate was based on first hand observation:

> In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of Conscience, it is well known that a religious establishment [would] have taken place in that State, if the Legislative majority had found as they expected, a majority of the people in favor of the measure. . . . Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in id.* at 272.

In the Federalist papers Madison argued forcefully that a republican form of government was essential to preserve minority rights.

> Complaints are every where heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided *not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.* . . .
>
> . . . [Factions develop whereby] a number of citizens, whether amounting to a majority or minority of the whole, . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.
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> • • • • •
>
> . . . [T]he most common and durable source of factions, has been the various and unequal distribution of

> property. Those who hold, and those who are without property, have ever formed distinct interests in society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation . . . .
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>
> . . . When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. . . .
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> • • • • •
>
> . . . [In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . .
>
> A republic . . . promises the cure for which we are seeking. . . .

The Federalist No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868) (emphasis added).

Alexander Hamilton expressed similar apprehensions for the rights of property owners in his contributions to the Federalist. He wrote: " '[A]dditional security to republican government, to liberty, and to property,' " is to be derived from the adoption of the Constitution. *Id.* No. 85, at 639 (A. Hamilton); and, "[A strong executive is essential] to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice . . . ." *Id.* No. 70, at 522 (A. Hamilton).

Initially, Madison did not publicly support a bill of rights. Prior to the ratification of the Constitution he "opposed all previous alterations as calculated to throw the states into dangerous contentions, and to furnish secret enemies of the

Union with an opportunity of promoting its dissolution." Letter from James Madison to George Eve (Jan. 2, 1789), *reprinted in* 5 Writings of James Madison 319-21 n. 1. Once the Constitution had been ratified by eleven states and "a very great majority of the people of America," he felt that "[c]ircumstances are now changed." *Id.* Madison reversed his position and supported the amendments as "providing additional guards in favor of liberty." *Id.* On June 8, 1789, Madison presented a draft of twelve proposed amendments to the first session of Congress. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash.L.Rev. 553, 595 (1972). Included was the following eminent domain clause: "No person shall be . . . obliged to relinguish his property, where it may be necessary for public use, without a just compensation." 1 Annals of Congress 434 (J. Gales ed. 1789). Stoebuck, *A General Theory of Eminent Domain*, 47 Wash.L.Rev. 553, 595 (1972).

If we look to the language of the Federal Constitution, and interpret the protection afforded property interests contained therein according to the intent of those who drafted it, it becomes unmistakably clear that the Hawaii Land Reform Act is unconstitutional. As anticipated by Madison, the Hawaii Legislature has become the instrument by which private property held by a minority of the persons within that state is to be redistributed to appease the desires of a landless majority to own residential land. The Federal Constitution and the fifth and fourteenth amendments were adopted with the express purpose of invalidating the taking of the private property from one person for the private and exclusive enjoyment by another.

IV

We are told by Appellees that court interpretations of the Federal Constitution support the validity of the Hawaii Land Reform Act. Our analysis of the cited cases follows. Although the scope of the power of eminent domain has been only vaguely and inconsistently stated, *see* Berger, *The Public Use Requirement in Eminent Domain*, 57 Or.L.Rev. 203, 204-05

(1978), there is one instance where there is general agreement that eminent domain must not be used. The sovereign may not take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit. *Missouri Pacific Railway Co.*, 164 U.S. at 417, 17 S.Ct. at 135; B. Schwartz, *A Commentary on the Constitution of the United States, The Rights of Property* (pt. 2) 241 (1965); *see also, Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798) (Chase, J., seriatum opinion) ("[A] law that takes property from A. and gives it to B. . . . is against all reason and justice . . . ."). None of the authorities cited by appellees has declared such an attempt constitutional.

V

The cases upholding takings for a public use teach us that we must look at each case on an ad hoc basis: "[W]hat is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." *Fallbrook Irrigation District*, 164 U.S. at 159-60, 17 S.Ct. at 63. There are several recurring facts and circumstances, however, that are present in the cases in which appellate courts have found a proper exercise of the power of eminent domain.

Courts have found that a taking has been for a public use where:

A. The taking will result in condemnation of property for an historically accepted public use.

B. The taking will result in a change in the use of the land.

C. The taking will result in a change in possession of the land.

D. The taking will result in a transfer of ownership from a private party to a governmental entity.

E. The taking will result in a de minimis condemnation necessary to facilitate the development of nearby land. None of these facts nor circumstances are present in the Hawaii Land Reform Act.

A

Following the establishment of the United States Constitution, there were two major kinds of activities for which the power of eminent domain was undisputedly properly employed: mill acts and road building. *See Berger, supra* at 205. General mill acts allowed any owner of land upon a nonnavigable stream to build and maintain mills for manufacturing purposes. *See Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 20-21, 5 S.Ct. 441, 445-446, 28 L.Ed. 889 (1885). In *Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140, 26 S.Ct. 353, 50 L.Ed. 696 (1906), the plaintiff challenged a general mill act enacted by Massachusetts. The Supreme Court summarily disposed of any general objection to the act on the basis that it constituted a taking for private use violative of the fourteenth amendment and noted that: "Such acts have been in force in Massachusetts ever since an act of 1714. . . . The practice sanctioned by them would seem from the recitals of that act to have been still older." *Id.* at 151, 26 S.Ct. at 354.

The Supreme Court similarly recognized a long-standing tradition of the use of eminent domain for the purpose of building roads in *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706, 43 S.Ct. 689, 692, 67 L.Ed. 1186 (1923). In *Rindge*, plaintiffs objected to the taking of its property for two proposed highways that were to be built entirely on its private property. Only one of the roads, the "main road," was to be connected to a public highway and only at one end; the other road, was to branch off the main road. *Id.* at 703, 43 S.Ct. at 691. The Court upheld the condemnation as being for a public use: "That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial." *Id.* at 706, 43 S.Ct. at 692.

This court found condemnation of private land for road building was a public use in *Guam v. Moylan*, 407 F.2d 567, 567-68 (9th Cir. 1969). The rationale, however, was based upon an analogy to redevelopment cases. *See id.* at 568.

Where the purpose of a taking has been historically deemed to be for the public it will be upheld by the courts.

B

The taking of private property has been upheld where there is a change in the use of the land. Often the change in the use is obvious and direct. Examples include the condemnation of land to build roads where no previous roads exist as in *Rindge*, 262 U.S. at 702-03, 43 S.Ct. at 691 or to build a railroad spur where no previous track exists. *Hairston v. Danville & Western Railway*, 208 U.S. 598, 600-01, 28 S.Ct. 331, 332-333, 52 L.Ed. 637 (1908). Similarly upheld are condemnations for the purpose of developing a power plant, *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 236, 60 L.Ed. 507 (1916) or developing a recreational area, *United States ex rel. TVA v. Welch*, 327 U.S. 546, 550, 66 S.Ct. 715, 717, 90 L.Ed. 843 (1946) (condemnation by TVA of private property for transfer to the National Park Service as part of the Great Smokey Mountains National Park); *United States v. 416.81 Acres of Land*, 514 F.2d 627, 629 (7th Cir., 1975) (undeveloped lands condemned for the Indiana Dunes National Lakeshore). Changes in the use of condemned property also may be upheld where the change is of a less direct nature. One such example involves the redevelopment of a community. *E.g., Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (discussed *infra*, § VI(A)).

Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946) is an example of a case that involves both changes of a direct and indirect nature. The major agricultural holdings of a landowner were to be condemned for, inter alia, three purposes which would result in a change in the use of the property: "(1) in small parcels to individual agregados [squatters] for the erection of their dwellings, (2) in somewhat larger parcels to individual farmers for subsistence farms and (3) in large parcels by lease to expert farmers, agronomists, or other qualified persons . . . for the operation of 'proportional-profit' farms . . . ." *Id.* at 319. Thus agricultural land was to be taken in some instances for building residences and in other instances for smaller farms, either upon which an individual

could subsist or upon which experts would operate proportional profit farms.

In each of the foregoing cases land was condemned for the purpose of putting it to a different use.

C

Another factual circumstance common to many constitutional takings is that the party who will possess the land after condemnation is not the same party who possesses it prior to the condemnation. The majority of the cases discussed above include examples of such a transfer of possession. One example of an instance where the possessor was the same before and after condemnation can be found in two cases where the government condemned a reversionary interest it held in leased land. *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162 (1925) (federal government can properly condemn reversionary interest in land it was leasing for possible military purpose); *United States v. Certain Parcels of Land*, 141 F.Supp. 300, 307 (D.Wyo. 1956) (condemnation of reversionary interest in land leased by government upon which government housing had been built is for a public use), *aff'd sub nom. Arp v. United States*, 244 F.2d 571 (10th Cir.), *cert. denied*, 355 U.S. 826, 78 S.Ct. 34, 2 L.Ed.2d 40 (1957). It is important to note, however, that in both of these cases, the government, not a private party, was the beneficiary of the condemnation.

D

Where the beneficiary of the condemnation is a governmental entity there is a strong indication that the taking is for a public use:

> [W]here the land is taken by the government itself, there is not much ground to fear any abuse of the [eminent domain] power. . . . [When the power is delegated to a private corporation] the presumption that the intended use for which the corporation proposes to take the land is

> public [when declared to be so by the legislature], is not so strong as where the government intends to use the land itself.

United States v. Gettysburg Electric Railway, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896). In two cases where the government was the beneficiary of condemned property, the government was a lessor seeking condemnation of the fee simple interest. In *Old Dominion Land Company* the government leased land for military purposes. 269 U.S. at 63, 46 S.Ct. at 39. When the lessor refused to renew the leases, the government initiated condemnation proceedings after an offer to purchase the land was refused. *Id.* The Court upheld the taking as a public use. *Id.* at 66, 46 S.Ct. at 40. Similarly, in *Certain Parcels of Land*, the government leased land upon which it built and maintained a housing project. 141 F.Supp. at 303. The owners of the land refused to renew the lease and the government sought to condemn the fee simple title. *Id.* The court found acquisition of the fee did not violate the public use limitation in violation of the owners' constitutional rights. *Id.* at 307.

Eastern Sugar Associates, 156 F.2d at 319, also involved a situation where the government could have remained in possession of the condemned land after condemnation. One of the acts that was challenged permitted the government to purchase lands and establish an organization to plant sugar cane for development of the sugar and liquor industries. *Id.* This was upheld as a taking for a public use. *See id.* at 324.

E

Finally, courts have upheld the condemnation of land where the taking is de minimis and for the purpose of facilitating the development of nearby land.

In *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), a mining company sought to condemn land for a right of way. The purpose was to erect an aerial bucket line that would result in the placement of four movable towers on the condemnees' land. *Id.* at 529-30,

26 S.Ct. at 302. The line would transport ore from the mines to the railway station two miles away. *Id.* at 529, 26 S.Ct. at 3021. *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905), involved an attempt to condemn a portion of a neighbor's land by enlarging a ditch to irrigate the condemnor's arid land to produce crops. *Id.* at 362, 25 S.Ct. at 676. The public use was upheld in both of these cases. In each case, the extent of the taking was minimal. The towers in *Strickley* were not permanent and the condemnor was under an obligation "to move the towers as often as reasonably required by the owners" in order for them to mine their land. 200 U.S. at 530, 26 S.Ct. at 302. *Clark* involved taking only enough land to widen by twelve inches the existing irrigation ditch which measured eighteen inches wide, twelve inches deep. 198 U.S. at 363, 25 S.Ct. at 676-677. Thus, both condemnations involved a minimal taking of land that resulted in an increased productivity of nearby land.

VI

A

The thrust of the Appellees contentions concerning the public use issue is that this court's inquiry must be restricted to whether the legislature, in enacting the Hawaii Land Reform Act, was acting within the parameters of its police powers. For example, Appellee Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund assert the following:

> *Berman* [348 U.S. at 26, 75 S.Ct. at 98] could not be clearer. If the legislative object is within its authority, the use of eminent domain is permissible, since that power serves simply as a means to the end. It follows that if it is constitutional to pursue an objective by police power regulations, eminent domain may be used.

Brief for Appellees Kahala Community Association, Inc. & Kahala Community Association Fee Purchase Fund at 23.

We disagree. *Berman* does not paint with so broad a brush. *Berman* involved the condemnation of buildings in a slum area for the purpose of building a new community. Congress had made a determination that the slum area was harmful to the health, safety, morals, and welfare of the public. *Id.* at 28, 75 S.Ct. at 100. It declared that condemnations for redevelopment pursuant to the redevelopment plan were for a public use. *Id.* at 29, 75 S.Ct. at 100-101. Buildings that were old, decayed, and unsafe were to be razed and replaced by new buildings. New homes, schools, churches, parks, streets and shopping centers were to be built. *See id.* at 34-35, 75 S.Ct. at 103-104. The court focused on the planned condemnations on an area basis rather than on a structure-by-structure basis. *Id.* at 34, 75 S.Ct. at 103. Thus, it was not important whether a single building represented a safety or health hazard or was unsightly. The important fact was "to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns." *Id.* This transformation from slum to healthy thriving community represents a change in the use of the land.

By contrast, the Hawaii Land Reform Act will result in no change in use of the property. The property itself is currently used for residential purposes. After condemnation it will be used for residential purposes. Appellees argue that there is a change in use in that the land is now used for investment purposes; subsequent to condemnation it will only be used for residential purposes and the owner of the newly created fee simple land will treat the property differently because he knows he can stay there as long as he chooses. These alleged changes in use, however, are simply different forms of *private* use.

The redevelopment in *Berman* authorized the transfer to public agencies of land "to be devoted to such public purposes as streets, utilities, recreational facilities, and schools." *Id.* at 30, 75 S.Ct. at 101. The remaining land was to be redeveloped

preferably by private enterprise. *Id.* Thus, it was possible that certain property owners would be permitted to repurchase their properties. *Id.* at 34, 75 S.Ct. at 103. The key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose, *i.e.*, the redevelopment of the area. In the case before us there is no such intermediate step in which the government holds the property for the accomplishment of a public purpose. The lessee simply retains possession of residential property throughout the condemnation process until he receives fee simple title. *Berman* does not authorize such a scheme. Nothing in *Berman* permits the lessee of property to take ownership of that property from the owner involuntarily through condemnation proceedings. Nothing in *Berman* would provide, as does the Hawaii Land Reform Act, the lessee of condemned property with greater rights to that property than the owner.

It is against this factual background that we must read its sweeping language: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* at 33, 75 S.Ct. at 103. The Supreme Court also stated in *Berman* that: "*Subject to specific constitutional limitations*, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 32, 75 S.Ct. at 102 (emphasis added). We read this language as requiring the judiciary to scrutinize carefully any legislative attempt to take private property so as to determine if it is in violation of any constitutional provision. The fifth amendment is specific: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V; *see also*, cases cited § VI(B) *infra* (role of judiciary in determining public use). To hold, as the district court below did, that the public use limitation is subsumed under a "police power/due process analysis," *Midkiff*, 483 F.Supp. at 67, would be to ignore the explicit language of the constitution and to disregard the fifth amendment protections granted to citizens of the states under the fourteenth amend-

ment. *See, e.g., Missouri Pacific Railway*, 164 U.S. at 417, 17 S.Ct. at 135. Such a result is untenable. Indeed, the Supreme Court has held that merely because the legislature has the power to regulate private property does not allow it to take that property without just compensation in violation of the fifth amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 392-393, 62 L.Ed.2d 332 (1979). It follows that because the state legislature has the power to regulate private property does not allow it to take that property for a nonpublic use in violation of the fourteenth amendment.

B

Appellees, citing *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40, also argue that review by this court is limited to the question of whether the determination of the existence of public use by the Hawaiian Legislature, Hawaii Rev.Stat. § 516-83(a)(12)[4] "is shown to involve an impossibility." Appellees direct our attention to the following cases as well: *Berman*, 348 U.S. at 32, 75 S.Ct. at 102 (citing *T.V.A.*, 327 U.S. at 552, 66 S.Ct. at 718; *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40); *Gettysburg Electric Railway Co.*, 160 U.S. at 680, 16 S.Ct. at 429; *Southern Pacific Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030, 87 S.Ct. 1485, 18 L.Ed.2d 591 (1967). The cases cited by Appellees, however, involved the review of a *congressional* determination that there was a public use, *not* the review of a state legislative determination. In *T.V.A.*, 327 U.S. at 552, 66 S.Ct. at 718 the Supreme Court stated that review of a congressional public use declaration is not the same as the

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4 Hawaii Rev.Stat. § 516-83(a)(12) states:

> The use of the power to eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated *is for a public use* and purpose.

(emphasis added).

review of a state legislative determination: "But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, . . . when *Congress* has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility.' " (quoting *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40 (emphasis added)). Where a state legislative determination is involved: "[i]t is well established that . . . the question what is a public use is a judicial one." *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); This matter involves a review, under the fourteenth amendment, of a state legislative determination. This court must properly make the ultimate determination of whether the use is public.

Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905) cited by one of the appellees for the proposition that courts should pay deference to state legislative determinations, is particularly appropriate here. The Court is explicit: " 'It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain . . . . For if the use be not public . . . the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required.' " *Id.* at 252, 25 S.Ct. at 256 (quoting *Tracy v. Elizabethtown, Lexington & Big Sandy Railroad*, 80 Ky. 259, 265 (1882)). Moreover, were Congress to enact a statutory provision that would allow condemnation of *A*'s private property for transfer to *B*, solely for *B*'s private use, this court would necessarily find such action contrary to the fifth amendment whether or not congress declared such proceedings to be for a public purpose. *See, e.g., Colchico v. United States*, 286 F.Supp. 507, 509 (N.D. Cal. 1968) (court to review whether federal taking for a public use); *United States v. 23.9129 Acres of Land*, 192 F.Supp. 101, 102 (N.D. Cal. 1961) ("This court need not, and will not, stand idly by and allow [federal] administrative officials to take private property arbitrarily, capriciously, in bad faith, *or for what is essentially a private purpose*." (emphasis added)).

VII

When we strip away the statutory rationalizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit.

The founders of this nation sought to give constitutional protection to minority rights. They wisely foresaw that attempts would be made by the states to take away the private property rights of the landed minority. Our Federal Constitution and the Bill of Rights were designed to prevent such abuses by the majority. That Constitution now compels us to find that the Hawaii Land Reform Act violates the public use limitation of the fifth and fourteenth amendments. Those provisions of the Hawaii Reform Act that provide for the condemnation of certain residential property are facially unconstitutional.

The decision of the district court is REVERSED and REMANDED for further proceedings consistent with the views expressed in this opinion.

POOLE, *Circuit Judge*, concurring.

I concur in Judge Alarcon's careful and well-researched opinion and in his conclusion that the Hawaii Land Reform Act violates the Fifth and the Fourteenth Amendments to the Constitution of the United States. I recognize that another member of this court, whose opinion is of value and entitled to thoughtful consideration, expresses a contrary view.

Nonetheless an independent review convinces me that in light of all considerations of logic, of the compelling authority of precedent, and of the Constitution itself, the Hawaii Land Reform Act is unconstitutional. It is my further opinion that the United States District Court properly undertook to decide that issue but reached a manifestly erroneous conclusion in upholding the Act.

But however firm these conclusions may appear to me, I am concerned that we not seem to have, as charged in our brother's scold, "cavalierly" ventured to decide these legal issues; asked the "wrong" questions and gotten "wrong" answers; or foresworn that "judicial modesty" which ought to have warned that we are not in position (as presumably are the Hawaiian legislature and courts) "to judge the effectiveness and constitutionality of any attempt at reform." I therefore think it useful to set forth in calmness and reason such of my own analysis as may indicate why the dissent is mistaken. For it is incorrect that we should have abstained; and it is incorrect that there was not squarely presented to a court of the United States an unavoidable constitutional issue which this court was bound to meet and which, I submit, we now have properly decided.

I. *Abstention.*

First of all, we have decided this constitutional issue because it is before us and as a court of the United States we are obligated to hear and decide those issues over which we have jurisdiction. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). It is that obligation, not pride or immodesty, that makes federal abstention "the exception, not the rule." *Id. See also Knudsen Corp. v. Nevada State Dairy Commission,* 676 F.2d 374, 376-78 (9th Cir. 1982); *Turf Paradise, Inc. v. Arizona Downs,* 670 F.2d 813, 819-21 (9th Cir.), *cert. denied,* ____ U.S. ____, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982). Abstention is only appropriate, " 'in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.' " *Colorado River,* 424 U.S. at 813, 96 S.Ct. at 1244 (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-63, 3 L.Ed.2d 1163 (1959)). Since the decision to abstain involves the district court's discretionary exercise of its equitable powers, it is reviewed under the abuse of discretion standard. *Turf Para-*

dise, 670 F.2d at 819. It would have been an abuse of discretion had the district court abstained.

A. *Pullman* Abstension

Four general categories of abstention have been generally recognized. The first, *Pullman* abstention, is appropriate where a federal constitutional issue may be avoided or presented in a different light by resolution of an issue under state law. *Colorado River,* 424 U.S. at 814, 96 S.Ct. at 1244-1245; *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Knudsen Corp.,* 676 F.2d at 377. For example, a state court might interpret the provisions of a challenged statute so as to moot the federal constitutional issue raised. *See, e.g., Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020 (5th Cir. 1981), *cert. denied,* 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). Here, however, as Judge Alarcon points out, the Hawaii Land Reform Act specifically provides that its provisions are intended to serve "a public use and purpose." Hawaii Rev.Stat. § 516-83(a)(12). Therefore, state courts of Hawaii could not interpret the statute to avoid the "public use" issue and hence federal review is not thereby spared.

Pullman abstention may also be appropriate where a state court may find that the challenged statute violates the state's own constitution. But such abstention is limited to application of a specialized state constitutional provision with no clear counterpart in the federal constitution. *See Santa Fe Land Improvement Co. v. City of Chula Vista,* 596 F.2d 838, 840-41 n. 3 (9th Cir. 1979); *Pue v. Sillas,* 632 F.2d 74, 80-81 (9th Cir. 1980); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4242 at 462-63 (1978). The Hawaii Constitutional Provision concerning eminent domain imposes the same "public use" standard as required under the Fifth and Fourteenth Amendment due process clauses of the United States Constitution. *See* Hawaii Const. art. I, § 20[1]; *Missouri Pacific*

1 Section 20 provides:

> Private property shall not be taken or damaged for public use without just compensation.

Railway v. Nebraska, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). Therefore *Pullman* abstention to permit application of this "mirror image" state constitutional provision would not be appropriate.[2] *See, e.g., Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero,* 426 U.S. 572, 598, 96 S.Ct. 2264, 2279, 49 L.Ed.2d 65 (1976) (abstention not appropriate under state constitutional provision similar to federal constitution equal protection clause); *Pue v. Sillas,* 632 F.2d at 81.

B. *Burford* Abstention

Abstention may also be appropriate under the standards originally set out in *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), to avoid "federal intrusion into matters which are largely of local concern and which are within the special competence of local courts." *International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Commission,* 614 F.2d 206, 212 n. 1 (9th Cir. 1980). In considering *Burford* abstention this court has examined whether the state channels into a single court lawsuits challenging the state agency's actions, whether the federal issues are inextricably linked to the state law issues, and whether federal adjudication would interfere with the state's efforts to maintain a consistent policy. *See Knudsen Corp.,* 676 F.2d at 377; *International Brotherhood of Electrical Workers,* 614 F.2d at 211.

Hawaii has not created specialized courts to hear cases arising under the Act and the federal due process issue is not linked to complex state law issues. Moreover, we have recently specifically refused to apply *Burford* abstention to cases involving zoning and land use questions, even though, as appellees suggest, issues regarding land use and regulation are

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2 The dissent implies, but does not endeavor to support, the view that somehow the courts of Hawaii might chance upon a construction of the Land Reform Act under circumstances not relying upon familiar concepts of "public use." Since this is only sheer speculation, it need not detain our thoughts.

special local concerns. *See International Brotherhood,* 614 F.2d at 211; *Isthmus Landowners Association v. California,* 601 F.2d 1067 (9th Cir. 1979) (challenge to coastal zoning regulations); *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092 (9th Cir. 1976) (zoning challenge); *Santa Fe Land Improvement Company v. City of Chula Vista,* 596 F.2d 838 (9th Cir. 1979). Thus, *Burford* abstention is not appropriate in this case.[3]

C. Prudential Abstention—*Colorado River*

The third ground for abstention, recognized in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), stems from princi-

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3 The principal case upon which appellees rely, *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), is generally classified as within *Burford* abstention. *See Colorado River,* 424 U.S. at 814, 96 S.Ct. at 1244-1245. In *Thibodaux* the Court upheld a lower court decision to abstain in an eminent domain action removed to federal court, referring to the "special nature" of eminent domain as "intimately involved with sovereign prerogative." 360 U.S. at 28, 79 S.Ct. at 1073.

Yet *Thibodaux* should not be read as an endorsement of abstention in all proceedings involving eminent domain. On the day it decided *Thibodaux,* the Court held that abstention was not appropriate in another eminent domain case, *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959). The Court specifically stated that merely because "a case concerns a state's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty." 360 U.S. at 191-92, 79 S.Ct. at 1064.

Although the two opinions are not easily reconciled, *see* C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4241 at 441 (1978), the Supreme Court has subsequently indicated that the principal significance of *Thibodaux* is its holding that a district court may find it necessary to abstain where the case involves "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River,* 424 U.S. at 814, 96 S.Ct. at 1244. In particular, the state law issue in *Thibodaux* was whether a city could exercise the power of eminent domain under Louisiana law—an issue, as *Colorado River* suggests, which transcended the importance of the case itself. Here there is no such independent state law issue.

ples of " 'wise judicial adminstration.' " 424 U.S. at 817, 96 S.Ct. at 1246 (quoting *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)). A district court may abstain where "exceptional circumstances * * * indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results." *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979). However, given the "unflagging obligation" of the federal courts to exercise their jurisdiction, the applicability of this doctrine is even more limited than the circumstances normally justifying abstention. *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246-1247. Thus in *Colorado River* the Court found that "exceptional circumstances" existed to dismiss the federal action in favor of a pending state action because of the Congressional policy set out in the McCarren Amendment to avoid piecemeal adjudication of water rights—a policy reflected in traditional rules governing the adjudication of property matters, and also because state law had established a single continuous proceeding for the adjudication of Colorado river water disputes. No comparable factors here favor adjudication in state court, and therefore the heavy burden necessary to justify abstention has not been met.

D. *Younger* Abstention

A fourth area for abstention is based on the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* held abstention appropriate where the federal claimant sought to restrain ongoing state criminal judicial proceedings. The principle has subsequently been extended beyond the criminal context to state proceedings which involve "important state interests." *Middlesex County Ethics Committee v. Garden State Bar Association*, ___ U.S. ___, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). Thus, the Supreme Court has specifically approved abstention to avoid interference with civil contempt proceedings initiated by a state court, *Juidice v.*

Vail, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); attachment proceedings brought by a state to recover welfare payments procured by fraud, *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); a custody proceeding in which the state sought to recover custody of abused children, *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); and state disciplinary proceedings for members of the bar, *Middlesex*, 102 S.Ct. at 2523 ("The importance of the state interest in the pending state jurisdiction proceeding * * * calls *Younger* abstention into play"); and *id.* at 2524 ("No proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles"). Since the federal claimant could raise the constitutional claims in the state proceedings, the interests of comity and federalism precluded federal interference in the state proceedings. *See* Hart & Wechsler, *The Federal Courts and the Federal System* 280-82 (Supp. 1981).

Although the Supreme Court has not addressed the issue, in *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975), the Seventh Circuit has held that a state's interest in eminent domain proceedings constitutes so important a governmental interest that *Younger* abstention is appropriate. That court reasoned that since the federal constitutional claims could be raised in the ongoing state court proceedings it was appropriate for the federal court to abstain "so as not to interfere with state sovereignty." 528 F.2d at 200.

Ahrensfeld, however, relied only in part on *Younger*'s abstention doctrine. The court also found that "other circumstances" were present which made *Pullman* abstention appropriate because of an unresolved issue regarding state valuation standards.[4] 528 F.2d at 199-200. But as indicated

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4 The project involved was the taking for the construction of an Athletic and Convention Center. The federal plaintiffs challenged public purpose and also that such a taking was improper under the applicable Illinois Eminent Domain Act. The court said: "Since 'the state court's interpretation of the [statute] may obviate any need to consider [its] validity

above, *Pullman* abstention is not appropriate here. Also, as already said, this circuit has concluded that a state's interest in land use and regulation does not automatically justify abstention under the *Burford* doctrine, which, like *Younger*, contemplates deference where there is an ongoing state judicial proceeding. *See Middlesex County Ethics Committee, supra; Zablocki v. Redhail,* 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 678 n. 5, 54 L.Ed.2d 618 (1978). Such ongoing action must begin "before any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda,* 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 223 (1975); *Middlesex,* 102 S.Ct. at 2524. Unless such an action is underway the interests expressed in *Younger* of avoiding duplicative litigation and interference with the state judicial system are not applicable. And proceeding in the federal action in such circumstances is not to be regarded as reflecting a lack of confidence in the state court's adjudication of constitutional issues because "the relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding." *Steffel v. Thompson,* 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974).

Appellants in this case filed their district court complaint in February, 1979. At that time the only extant proceedings at the state level were public hearings being conducted by the Hawaii Housing Authority as required under the Hawaii Land Reform Act before instituting condemnation of certain of appellant's residential tracts. *See* Hawaii Rev. Stat. § 516-22.[5]

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under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily.' " 528 F.2d at 200 (citing *City of Meridian v. Southern Bell Tel. & Tel. Co.,* 358 U.S. 639, 641, 79 S.Ct. 455, 457, 3 L.Ed.2d 562 (1959), and *Martin v. Creasy,* 360 U.S. 219, 224, 79 S.Ct. 1034, 1037, 3 L.Ed.2d 1186 (1959). (Citations omitted.)

5 Section 516-22 provides:

Designation of leased fee interest in all or part of development tract for acquisition. The authority may designate all or a portion of a development tract for acquisition and acquire leased fee interests in residential houselots in such development tract, through the exercise

The dissent refers to four state court condemnation suits which at various times were pending in the state court. All were settled without trial. Three were terminated before the district court ruled on the summary judgment motions before it. The fourth remained pending after the final judgment was entered here, but it too was settled. The dissent misreads the law in its premise that the mere filing of a condemnation action would *proprio vigore* bring into play the requirement of abstention. As Justice Brennan stated in *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209, 1216 n. 10, 39 L.Ed.2d 505 (1974):

> of the power of eminent domain or by purchase under the threat of eminent domain after twenty-five or more lessees or the lessees of more than fifty percent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority to purchase the leased fee interest in their residential leasehold lots pursuant to section 516-33 and if, after due notice and public hearing, * * * the authority finds that the acquisition of the leased fee interest in residential houselots in all or part of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in this part will effectuate the public purposes of this chapter.

Younger abstention was, as contended by the dissent, not triggered by the Housing Authority hearings provided by the statute since the Supreme Court has indicated that abstention is limited to judicial and not administrative proceedings. *See Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 112-13, 102 S.Ct. 177, 184, 70 L.Ed.2d 271 (1981). *Cf. Patsy v. Board of Regents*, ___ U.S. ___, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (exhaustion of state administrative remedies not required under section 1983).

In *Middlesex*, 102 S.Ct. at 2522, the Court concluded that the district court properly abstained to prevent interference with disciplinary proceedings of a local District Ethics Committee appointed by the New Jersey Supreme Court. However, there the Court specifically found that under New Jersey law the proceedings were "judicial in nature." In particular, the Court noted that the local committees are considered the arm of the New Jersey Supreme Court and that filing a complaint with the committee "is in effect a filing with the Supreme Court."

In the present case, the public hearings before the Hawaii Housing Authority bear none of the attributes of a judicial proceeding such as that found in *Middlesex*.

> "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. [Citations omitted.]

In May, 1979, the district court heard appellants' motion for a preliminary injunction. It found that on the merits appellants were unlikely to prevail on their general due process challenge, but that the statute's mandatory arbitration and valuation provisions were facially unconstitutional. Accordingly, the court held that the state administrative condemnation proceedings could proceed but it enjoined the operation of the objectionable arbitration and valuation provisions.[6] The Hawaii Housing Authority did not actually file the first of its eminent domain lawsuits in state court against appellants until September, 1979, shortly after the parties in district court had begun filing motions for summary judgment.

Thus by the time the state proceedings were instituted in this case the federal action was well beyond "the embryonic stage." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). Under those circumstances abstention was not appropriate. *See id.* (*Younger* abstention not applicable where district court issued preliminary injunction prior to institution of state criminal action); *Housworth v. Glisson*, 485 F.Supp. 29 (N.D.Ga. 1978) (hearing for injunctive relief on plaintiff's likelihood of success qualifies as proceedings of substance on the merits).

Moreover, it appears that the state attorney general never raised the *Younger* issue at any time before the district court.[7] Although the parties may not waive the applicability of *Pullman* abstention, *see e.g., Santa Fe Land Improvement Co.*, 596 F.2d at 840, the Supreme Court has specifically indicated that the *Younger* doctrine need not be considered if not invoked by the state:

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6 Following the district court's ruling, the Hawaii Legislature amended Section 516 to remove the mandatory arbitration provision and to amend the valuation provisions.

7 In fact, no party addressed the abstention issue until the court raised the subject at oral argument.

> If the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480, 97 S.Ct. 1898, 1904, 52 L.Ed.2d 513 (1977). Accordingly, in submitting the issue of the statute's constitutionality to the district court in this case, it appears that the Hawaii attorney general effectively waived his claim for *Younger* abstention. *See Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n. 5 (5th Cir.1978), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Evansville Book Mart, Inc. v. City of Indianapolis*, 477 F.Supp. 128, 130 (S.D.Ind. 1979); Wright, Miller & Cooper, *Federal Practice and Procedure* § 4252, at 547-48 (1978). We need not, however, rely solely on waiver, for independently it is clear that *Younger* does not apply.

In sum, none of the circumstances recognized by the federal courts as calling for abstention are present here. Therefore the district court did not abuse its discretion in proceeding to decide the constitutional issue before it.

II. Public Use

The Hawaii Land Reform Act, Part II, authorizes eminent domain proceedings for the purpose of transferring from the fee owners to existing lessees the fee simple title to single family residential lots held under long term ground leases. Haw.Rev. Stat. §§ 516-21 through 45. The act applies to residential lots of not more than 2 acres located in development tracts of not less than 5 acres and held under leases for terms of twenty years or more. Haw.Rev. Stat. § 516-1(2), (5), (11).

Condemnation proceedings are actually initiated on petition of lessees desiring to obtain the fee title to their leased property. The statute requires that the application be on behalf of the lessees of 25 lots or 50% of the lots in a development, whichever is less. Haw.Rev.Stat. § 516-22.

While the statute permits the state to appropriate funds and issue bonds for the purpose of implementing the statute, it appears that (except for administrative overhead) the state uses no public monies to acquire property under the statute. The condemnation award and incidental costs of condemnation are paid by the private lessee acquiring a given property. Haw.Rev.Stat. §§ 516-30, -33, -33.5.

Under the statute, the Hawaii Housing Authority may elect to condemn only those lots which lessees have applied to purchase. Haw.Rev.Stat. § 516-22. While the Housing Authority is required to find that the acquisition "will effectuate the public purposes" of the statute, it need not find existence of a shortage of fee simple property in the county in which a condemned lot is located. *Compare* 167 Haw.Sess.Laws, Act 307 § 11 *and* Haw.Sess.Laws, Act 184 § 2(6) *with* 1976 Haw.Sess.Laws, Act 242 § 2 *and* Haw.Rev.Stat. § 516-22.

In addition to the condemnation provisions, the Hawaii statute also provides new safeguards to lessees of residential properties who continue under long term leases. Haw.Rev.Stat., Part III. Rights of Lessees, §§ 516-61 through 70. Among these are rent control and guarantees that such lessees may sell or assign their leasehold interests, and may cure default, this presumably easing the structures of the landlord-tenant rigid relationships.

But no restrictions are placed by the Act on the use or alienation by a lessee-turned-feeholder of his property interest. If the new owner elects to let out to a new tenant under a long-term lease, that tenant does not receive protections of Part III. The new feeholder may therefore turn around and sell that property subject to a long-term ground lease in which *he* now holds a reversionary interest, thereby continuing the very cycle and effectively frustrating the avowed purpose of increasing the incidence of fee simple residential properties in Hawaii. Because the property is no longer part of a minimum five-acre tract, the lessee-turned-lessor's property is not subject to disfeasance by operation of the eminent domain scheme under which the former tenant, now a landlord of a long-term lease,

acquired the interest. *See* Haw.Rev.Stat. § 516-1(5). Alternatively, of course, the new feeowner may elect to retain and live on his land as before, or may sell or lease a partial or entire interest therein, just as prior to the taking he and his former landlord had such options according to their respective holdings.

Thus the statute permits, but neither requires nor contemplates, a change in the use of the land. It merely provides a procedure for the involuntary transfer of title in the affected property from the disfavored lessor to the now advantaged lessee. Appellants argue that a condemnation scheme which results in change neither in use nor in possession, and whose sole effect is to transfer title from A (the lessor) to B (the lessee) does not constitute a taking for a public purpose, and so violates the fourteenth amendment. Judge Alarcon agrees, and I concur.

> The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

Missouri Pacific Railway v. Nebraska, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937) (citing *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 605, 28 S.Ct. 331, 334, 52 L.Ed. 637 (1908); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705, 43 S.Ct. 689, 692, 67 L.Ed. 1186 (1923); *Cincinnati v. Vester*, 281 U.S. 439, 446, 449, 50 S.Ct. 360, 362, 363, 74 L.Ed. 950 (1930). In my view, the Hawaii statute accomplishes precisely this invalid result, for if it does not constitute a transfer "for the private use of another," that term can have no meaning.

The legislature has set forth a number of findings in its attempt to clothe with the trappings of "public use" what is no

more than a transfer for the private use of another. *See e.g.*, Haw.Rev.Stat. § 516-83. Determining what constitutes a public use for fourteenth amendment due process examination of eminent domain proceedings, however, is a justiciable question ultimately to be determined by the court, and not the legislature. Thus, while a legislative determination of public use is entitled to considerable deference, it is not binding on this court. *Hairston v. Danville & Western Railway*, 208 U.S. 598, 606, 28 S.Ct. 331, 334, 52 L.Ed. 637 (1908); *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 551-52, 66 S.Ct. 715, 717-718, 90 L.Ed. 843 (1946); *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, § 7.4 (1981).

It is true that "public use" is not synonymous with "use by the public," and that a state may condemn property to be sold or leased to individuals as Judge Alarcon has explained, citing *inter alia, Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 (1896); *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied* 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946). But the private benefit must be an incidental one, and not the dominant purpose of the taking. *Adams v. Housing Authority*, 60 So.2d 663 (Fla. 1952); *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451 (Fla. 1975).

> [E]minent domain cannot be employed to take private property for a predominately *private* use; it is, rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private

> property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law.

Id. at 455 (footnotes omitted).

In determining public use, the court may consider extrinsic facts and examine the statute as a whole to "discover the dominant purpose of the taking." 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 7.4[1]. "In short, the constitutional protection against the taking of public property for private use cannot be evaded by any colorable declarations that the use is public however formally and officially made." *Id.*

Upon examination of the statute and the evidence of record, I conclude that the Hawaii Land Reform Act's eminent domain provision cannot be saved as an exercise of police power. It is beyond doubt that legislation need not be wise, nor the best means for fulfilling relevant social and economic objectives. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 317, 96 S.Ct. 2562, 2568, 2569, 49 L.Ed.2d 520 (1976); *Dandridge v. Williams*, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). However, when as here the drastic effects of a statute contrast so starkly with its professed goals, leaving in shadow the nexus of reasonable relationship to those goals, one may question whether a public purpose in fact exists.

The Hawaii Land Reform Act proclaims its purpose to be the alleviation of the shortage of fee simple residential land in Hawaii. Yet, as set forth above (see page 13, lines 23-26), the legislature has amended the statute to delete a requirement that the Housing Authority, to whom is committed the power and decision to take, first find a shortage of fee simple housing in areas in which acquisitions under the statute are to be made.

The legislature has determined that the concentration of residential lands in the hands of a few holders who choose to

lease under long term leases has caused shortage and has resulted in an inflation of land values. In fact, the statute itself is so structured that it can only aggravate this shortage and resultant inflation of land values. The Hawaii Circuit Court has found as fact that in late years the large landholders have made residential homesites available, albeit through the traditional leasehold arrangements. *Midkiff v. Amemiya*, Civ.No. 47103 (Haw. 1st Cir.) (Findings of Fact).

But those problems with the Act, while telling of its nature, could not alone condemn it entirely. What does infect it with unconstitutionality is that it authorizes an agency of the state, upon the application of tenant, to divest his landlord of the latter's entire property and to convey it to the erstwhile tenant in fee for the sole purpose of constituting that tenant as the owner. The statute does not accomplish this transformation merely incidentally en route to the effectuation of other, different, presumably more urgent objectives; nor is it that in its unreconstituted form, the present right of freeholding threatens, interferes with, delimits, pollutes or offends against the commonweal. The divestiture is single-minded and patent of purpose: it strips the owner of the fee and vests the fee in the tenant. Otherwise, there is not an iota of change. Not a stick, stone, blade of grass, or flake of paint is altered; the use continues precisely as it was before; the awesome mechanism of taking becomes *functus officio* in the instant of its exercise; its only service is to sever ownership from A and bestow the same on B.

Indeed a unique and drastic analogue of "eminent domain" is created by this legislation; but that characterization would not alone be cause to strike it down. Indeed the purported justification is that it responds to a perceived need; but so also have many legislative enactments since December 15, 1791—the ratification date of the "Bill of Rights"—proclaimed their aim to attend outstanding needs, yet failed in passing constitutional muster. The problem which this Act cannot overcome is not its novelty or boldness or philosophical drift or internal deficiencies. The problem is in the bar of the Fifth Amendment

which reads in simple words: "[N]or shall private property be taken for public use, without just compensation."

It is not enough that a "just" price be paid when the public (the state) seeks to invade the right of lawful private ownership: the use for which the taking is made must itself be for a public purpose. It is not a public purpose to take the property of one person in order that it may become the private property of another. It is said that "outsiders" may have a problem "in comprehending the constitutionality" of this legislation. (Dissent, page 808.) A commentator, quoted *in extenso* by the dissent, *id.*, has written that one factor which a reviewing court might consider, "if only subconsciously, is the current political reality that in much of the world land reform is essential if democratic forms of government are to emerge or to prevail." That writer's thesis is that elsewhere "redistribution of the land" is taken for granted, and that it would be anomalous for "this government" to insist on land reform elsewhere if "its own Constitution prevents similar reforms in the American states."

However interesting a commentary on comparative international polity, that analogy and that rationale are both inapposite in the face of the organic restraints which our Constitution was intended and is held to impose upon governmental authority. We cannot foresee what the future may hold, and unborn generations may yet witness triumph of the right to such "redistribution" of the property of others. But before that Huxleyan advent, there will have to come some change in Amendment V, with a corresponding disfavor of the principle, known to us not later than Magna Carta, that one's freehold may be taken only "by lawful judgment of his peers, or by the law of the land."[8]

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8 "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, now will we go upon him, nor send against him, save by lawful judgment of his peers, or by the law of the land. We will not sell, nor deny, nor delay to any man either justice or right." Magna Carta (1225), Cap. XXIX, Pound and Plucknett, *Readings on the History and System of the Common Law*, 3d ed., page 180.

The legislature has found:

> Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land. . . .

Haw.Rev.Stat. § 516-83(3).[9] In fact, however, as the Circuit Court also found, on Oahu, the most populous Island with the most acute housing shortage, "there is only a 10 percent difference in the price between fee simple properties and comparable leasehold properties." *Midkiff v. Amemiya, supra* (Findings of Fact). The point is not that housing shortages do not exist in the Islands; it is that shortages of similar kind and degree exist in other of the 50 states, and so do constitutional limitations.

The thrust of the statute, therefore, is not nearly so much the providing of residential housing where it may not reasonably be had; it aims and objectives are to leave the residential supply as it exists, but to shift the fee from present owners to their lessees. And this in fact is all that the statute does.

In the Act before us the state legislature has simply decided that it prefers B's ownership of the land to A's, and the vesting of B with ownership of property heretofore lawfully held by A constitutes the statute's only substantive change. When, as here, the only variable presented is whether A or B holds title to the land, the public purpose vanishes. *See Thompson v.*

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9 While the legislature finds a shortage of fee simple residential property, it is significant that there is a surplus of condominiums on the islands. *See Midkiff v. Amemiya* (Findings of Fact), *supra*.

Consolidated Gas Utilities Corp., 300 U.S. at 80, 57 S.Ct. at 376.[10]

I conclude therefore that the taking authorized by the Hawaii Land Reform Act is not a taking "by the law of the land" and is therefore invalid under the Fifth and Fourteenth Amendments to the Constitution of the United States.

FERGUSON, *Circuit Judge*, dissenting:

The majority cavalierly decides that the legislature of Hawaii is forbidden by the federal constitution to carry out its program of residential land reform. In so doing, the majority has decided, wrongly, an issue that neither this court nor the district court should have reached in the first place. The majority has substituted its opinion for the careful judgment of the Hawaii state courts, and the Hawaii legislature, in "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Canton v. Spokane School Dist. # 81*, 498 F.2d 840, 845 (9th Cir. 1974), *citing Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498, 61 S.Ct. 643, 644, 85 L.Ed. 971 (1941). The majority has interfered with a state legislature's exercise of a power which is "an inherent attribute of sovereignty," *County of San Mateo v. Coburn*, 130 Cal. 631, 634, 63 P. 78 (1900), and which is " 'universally' recognized and 'necessary to the very existence of government.' " *City of Oakland v. Oakland Raiders, Ltd.*, 32 Cal.3d 60, 64, 183 Cal.Rptr. 673, 646 P.2d 835 (1982). "The right is the offspring

10 "For a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have the power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good." J. Locke, *The Second Treatise of Government (An Essay Concerning the True Original, Extent and End of Civil Government* 138 (J. Gough 3d ed. (1966) at 71)).

of political necessity; and it is inseparable from sovereignty, unless denied by its fundamental law." *Kohl et al. v. United States*, 91 U.S. 367, 372, 23 L.Ed. 449 (1875). The majority labels the Hawaii legislature's attempt to exercise this fundamental sovereign power a "tyranny of the majority." But "concrete cases are not to be decided by calling names." *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, 324 (1st Cir. 1946). My research has disclosed no case supporting the conclusion that the statute here at issue is unconstitutional on its face. To the contrary, precedent and common sense both point quite plainly to the opposite conclusion. I therefore dissent.

One commentator has already anticipated the problem that outsiders would have in comprehending the constitutionality of the Hawaii Land Reform Act.:

> The almost instinctive feeling that the Hawaii Act is radical may be based to some degree on an emotional reaction rooted in the assumption that since land is easily available on the open market to anyone who wants to buy it, no man should be forced to sell his land to another. This assumption, although valid in most parts of continental United States, is not valid in the island State of Hawaii.
>
> One factor that argues in favor of the Act and may be considered by the Court, if only subconsciously, is the current political reality that in much of the world land reform is essential if democratic forms of government are to emerge or to prevail. In both Asia and Latin America it is taken for granted that a redistribution of the land must be accomplished as a vital first step in carrying out reforms that will allow democratic governments to be established and survive. Land reform is necessary for the economic, political, and social health and stability of many of these nations.
>
> It would be anomalous and somewhat hypocritical if the United States Government were to insist that land reform be undertaken in other countries when its own Constitution prevented similar reforms in the American

States. True, there is a substantial difference between the State of Hawaii and a country like South Vietnam. The most obvious one is the difference between their economies—there are no peasants in Hawaii. But to recognize that difference is not to say that for the long-term political and economic health of Hawaii, land reform here is not as necessary as land reform is to the long-term development of South Vietnam. The existence of a monopoly that can control scarce land resources in Hawaii is dangerous because control of land in an island State represents more than the economic power that the land represents in dollar value.

The state's right to control other types of monopolies is clear; Hawaii's right to control and break up a land monopoly should be at least as clear considering the greater danger such monopoly poses to the political and economic health of an island State.

Conahan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 Hawaii B.J. 31, 53 (1969) [hereinafter cited as *Hawaii's Land Reform Act*].

The majority begins by asking the wrong question. It believes that it "must decide whether the Federal Constitution permits a state to take the private property of *A* and transfer its ownership to *B* for his private use and benefit." Maj. op., *ante*, at 790. But the land reform program does not simply transfer land from one owner to another owner for his private use and benefit; it transfers land from a handful of large owners to numerous small owners. Moreover, the "transfer" here can be accomplished only through the intervention of the Hawaii Housing Authority, which must find that the transfer accomplishes the public purposes of the Land Reform Act. Thus, the majority's analysis begins with a distorted account of what the statute actually does. The real question in this case is not whether a naked transfer of title solely for a person's private use is an unlawful taking. The real question is whether the legislature of Hawaii may, pursuant to a plan carefully tailored to guarantee due process and just compensation, bring

about the redistribution of privately held land where the legislature has found (a) that the concentration of such land in the hands of a few landholders is a cause of great social and economic harm to the public and (b) that the distribution of such land in small parcels to many persons will be to the public's benefit and advantage. Having asked the wrong question, the majority predictably arrives at the wrong answer.

I. COMITY AND FEDERALISM

As I see it, the only questions presented to us by this case are, first, whether the district court should have abstained from deciding it on the merits; and, second, if not, what is the appropriate standard of review to be applied by a federal court in passing upon a facial challenge to a legislature's exercise of the power of eminent domain. The answers to both questions emanate from the joint principles of judicial restraint, comity and federalism, which counsel courts not to interfere unnecessarily with the exercise of legislative functions by substituting their judgment for that of legislatures on primarily legislative functions, and which counsel the federal courts not to interfere unnecessarily with the exercise of fundamental state powers.

Issues concerning land use within a state are not easily made a subject of federal concern. It is an essential attribute of a state's sovereignty to be able to use land to promote the commonweal. That is why a state may take land for a public use. Whether land is used to promote the common good must invariably depend on facts and circumstances that will vary from state to state.

Abstention, and, failing that, deference to legislative judgment, was uniquely appropriate in this case not only because the Land Reform Act is significant to the Hawaiian people, but because the case will now have an unfortunate impact on any future attempt by any state to experiment with land reform, regardless of whatever compelling needs may exist in a particular state. Hawaii faces a very difficult land situation. Judicial modesty should prevent us from thinking that we are in a better position than the Hawaiian legislature and courts to

judge the effectiveness and constitutionality of any attempt at reform.

The majority ignores the nature of our federalist compromise. The Constitution could have decided that states are merely administrative organs of the central government, but in fact the Constitution decided otherwise. States have been granted independent law-making power, the purpose of which is to provide their people with public benefits and services. There can be no more basic "benefit" than land.

One advantage often cited in favor of our federal system is that it allows a high degree of free play to the states. "It is one of the happy incidents of the federal system," Justice Brandeis wrote, "that a single courageous state may if its citizens choose serve as a laboratory and try social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 387, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

The Hawaii Land Reform Act is an important state experiment. The recognition that control over land is crucial to the existence of "the state as a state" is implicit in federal court decisions abstaining in state eminent domain proceedings. As the majority recognizes, *citing Louisiana Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25, 28, 79 S.Ct. 1070, 1073, 3 L.Ed.2d 1058 (1959), "a state's eminent domain proceeding is intimately involved with sovereign prerogative." Maj. op., *ante*, at 789, n. 1.

The power of eminent domain is a fundamental sovereign power of the states. Its exercise has always been a legislative function. The majority's decision to declare facially unconstitutional the statute before us is thus an extraordinary exercise of the federal judicial power. I find nothing in the statute so extraordinarily offensive as to call for such an exercise.

II. ABSTENTION

Abstention is appropriate in this case, basically, because without it the federal courts will be interfering unnecessarily in state judicial processes and judgments. Several more particular reasons for abstention are apparent upon closer examination.

A. *Younger* Abstention.

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, teach that the federal courts ought to abstain from deciding cases which implicate important state interests, when those same issues are the subject of current adjudication in the state courts. Where state criminal proceedings are begun against federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the abstention principles of *Younger* may apply in full force. *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S.Ct. 2281, 2291-92, 45 L.Ed.2d 223 (1975). Today, seventeen years after *Hicks*, the policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. *Middlesex County Ethics Committee v. Garden State Bar Association*, ___ U.S. ___, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). In the instant case, state court proceedings were pending before any proceedings of substance on the merits had taken place in federal court.

State administrative proceedings preceded the plaintiffs' filing of their complaint herein in federal district court. On April 22, 1977, pursuant to the statutory requirements of the Hawaii Land Reform Act, a public hearing was held on the proposed acquisition of Tract H. On October 20, 1978, the Hawaii Housing Authority made statutorily required findings that acquisition of tract land would effectuate the public purpose underlying the Hawaii Land Reform Act. On October 23, pursuant to statute, the Trustees were directed to negotiate the sale of tract land. On January 18, 1979, the Hawaii Housing Authority declared that negotiations had failed. On January 22, 1979, the Hawaii Housing Authority ordered mandatory negotiations, a move that was later enjoined by the federal district court. Meanwhile, in *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii Ct.App. filed June 29, 1978) (complaint of the Trustees of the Bishop Estate asking for declaratory judgment), Judge Lum issued extensive findings of fact and upheld the constitutionality of the Hawaii Land Reform Act.

Not until February 28, 1979 did the plaintiffs in the instant case file their complaint in federal court. On November 14, 1979, the district court held a hearing on the initial motion for summary judgment. But by then, three condemnation suits were already pending in the state court. Civ. Nos. 59201, 59202 & 59191. These suits were eventually settled. On April 3, 1980, a subsequent motion for partial summary judgment was heard in the federal district court. However, by then, a fourth condemnation proceeding was pending in the state courts. Civ. No. 60465. On June 10, 1980, the district court issued a final judgment and permanent injunction. *Midkiff v. Tom*, 483 F.Supp. 62 (D.C.Hawaii 1979). The fourth condemnation proceeding, however, was not settled until September 1981.

As of October 18, 1981, the date upon which we heard oral argument in this case, condemnation suits encompassing eighteen of the Trustees' subdivisions were pending in state courts. Thus, condemnation suits were continuously pending in the state courts from *before* the federal district court heard the initial motion for summary judgment until after we took this appeal under submission. It appears that such suits are still pending now.

On November 9, 1981, an interlocutory appeal was taken to the Hawaii Supreme Court on the issue of whether a particular condemnation under the Hawaii Land Reform Act was being done for a public purpose. *Hawaii Housing Authority v. George Li Brown*, Civ. No. 60945, Supreme Ct. No. 8489. In that case, the Hawaii Supreme Court denied lessees' motion to dismiss landowners' attack on the constitutionality of the Hawaii Land Reform Act. In so doing, the court stated, "it appears that the law does not favor the waiver of a claim that a statute is unconstitutional. . . . The constitutional issue in this case is of course an issue of public importance."

Citing both *Younger* and *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the Seventh Circuit held that a district court properly refrained from interfering with pending state court eminent domain proceedings. *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). Citing also *Louisiana Power & Light Co. v. City of*

Thibodaux, supra, the court noted the sensitive nature of federal court intervention in a state's eminent domain system. Also cited with approval was *Creel v. City of Atlanta*, 399 F.2d 777, 779 (5th Cir. 1968), which stated in reference to a federal constitutional challenge proceeding simultaneously with a state court condemnation proceeding:

> [T]he principal and essential issue is one properly for determination by the state courts. Not only is municipal eminent domain ordinarily a local matter, but it is difficult to imagine a situation where more confusion would arise than would be the case if the parties here were allowed to simultaneously pursue both this action and the state condemnation proceeding.

Ahrensfeld, supra, at 198. The *Ahrensfeld* court reasoned that, since the plaintiffs were able to raise the crux of their federal constitutional claims in the pending state action, federal court intervention was unnecessary.

Since important state interests are involved in the implementation of a state's land use policy, *Younger* abstention is fully applicable here:

> The importance of the state interest in the pending state judicial proceeding and in the federal case calls *Younger* abstention into play. So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith harassment or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain.

Middlesex County Ethics Committee v. Garden State Bar Ass'n, supra, ____ U.S. at ____, 102 S.Ct. at 2523. The constitutional issue in the case before us has been and remains before the Hawaii courts. Clearly the proper route of review for the instant case would have been up the state court ladder and then to the United States Supreme Court.

B. *Pullman* Abstention.

Even if there were no ongoing state proceedings requiring abstention under *Younger*, the principles announced in *Pullman, supra*, would call for abstention in this case. The Court in *Pullman* was confronted with an issue which was "more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." 312 U.S. at 498, 61 S.Ct. at 644. The Court observed that adjudication of the constitutional question might be avoided because the case also presented a potentially determinative issue of state law. Under those circumstances, the Court held, the district court ought to abstain from deciding the constitutional issue, as long as it appeared that a definitive ruling on the state issue could be obtained in the state courts "with full protection of the constitutional claim."

Pullman abstention is appropriate here, as there may well be an alternative to adjudicating the federal constitutional challenge to the land reform statute. The question concerning the meaning of public use need not be broached if the Hawaii Land Reform Act permits the state to continue to regulate the condemned property in some way to achieve the public goals of alleviating conditions such as inflation and land shortage. Whether the statute permits any continued regulation is a doubtful and possibly determinative issue of state law. By determining the issue on federal grounds, the majority deprives the state of legitimate opportunity to uphold the land reform program.

Furthermore, there has been no definitive ruling as to whether the statute is constitutional under the Hawaii Constitution, which has its own "public use" requirement. A judgment by the Hawaii Supreme Court that the statute was in conflict, either on its face or as applied, with the Hawaii Constitution, would eliminate forever the need for this or any court to decide whether the statute conforms to the requirements of the federal constitution.

The majority correctly points out that our court will only reverse the district court's refusal to abstain if such a refusal involves abuse of discretion. In the case at hand the district court did "abuse its discretion," and thus this court should overturn the decision. A leading article on abstention doctrine has persuasively argued:

> [B]efore abstaining in an authorization case, the federal judge should ascertain whether abstaining will serve any purpose by determining which way he would rule on the state law issue in the absence of abstention. If he would hold the program unauthorized, so that abstention might prevent interference with a state program, he should also ascertain whether the program would suffer irreparable harm from interference. The greater the harm, the more this factor weighs in favor of abstention.

Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine,* 122 U. of Pa.L.Rev., 1021 at 1126 (1974). Among the "imprecise factors" to be weighed in making the decision are "the degree of unclarity of state law; the extent to which error might harm a state program; and the extent to which the federal constitutional issue is sensitive and calls for swift adjudication." *Id.*

Here, the federal court's decision that the state's program is unconstitutional will irreparably damage the program. Moreover, the federal constitutional issue is complex and not one that demands immediate adjudication. And there is a possibility of a constitutional construction of the statute. *See* Parts III(C) & (D), *infra.* Thus, in this case the factors weigh in favor of abstention.

In making the decision to abstain in a particular case, a federal court must refer back to our system of federation. Some issues demand federalization. One thinks, for example, of the rights of women and minorities. Given our national history, women and blacks have suffered harms unique to our nation, not to any given state. Thus, it is not only feasible but necessary to protect such rights on a national basis. Rarely is it

appropriate for a court to abstain when it has before it a case addressing rights of women or minorities. *Los Angeles Unified School Dist. v. United States Dist. Court for the Central Dist. of California*, 650 F.2d 1004 (9th Cir. 1981) (Ferguson, J., dissenting). Certain kinds of issues are not easy to federalize. Land reform in particular presents a situation in which the problems of each state vary widely. An attempt to federalize takes away from the state an important power and robs its people of any attempt to reach an innovative solution democratically.

III. THE DOCTRINE OF PUBLIC USE

Having wrongly reached the merits in this case, the majority comes to the wrong conclusion about those merits. My analysis of the facts of this case and the applicable law convinces me that the statute under review is constitutional on its face. The majority errs, I think both by mischaracterizing the facts and by misconstruing the applicable law.

A. Standard of Review

If a federal court must consider the merits of a defendant's contention that a taking is not for a public use, the court should apply the proper standard of review. The court must give great deference to the state legislature's determination and to the ruling of the state's highest court. The standard of review is a narrow one. As a consequence:

> [T]he Court has never actually held a use to be private which the courts of a state, with their intimate knowledge of local conditions and requirements (and with the concurrence of the legislature or even of the people of the state), have declared to be public.

Nichols, *Eminent Domain* § 7.31[1] [1980]. Of course, this court has been unable to profit from the wisdom of Hawaii's courts, whose judges are intimately knowledgeable about the conditions of that state, because the federal proceeding has aborted the orderly adjudication of issues in the state courts.

The majority is cognizant of precedent requiring great judicial deference to a legislative determination that a use is a public use. *Berman v. Parker,* 348 U.S. 26, 31-32, 75 S.Ct. 98, 101-02, 99 L.Ed. 27; *United States ex rel. T.V.A. v. Welch,* 327 U.S. 546, 551-52, 66 S.Ct. 715, 717-18, 90 L.Ed. 843 (1946); *United States v. Gettysburg Electric Ry. Co.,* 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896).

The majority, however, incorrectly distinguishes those cases on the ground that they involve the review of congressional rather than a state legislative determination.

In the most recent of those cases, *Berman, supra,* Congress authorized a taking in the District of Columbia. "The power of Congress over the District of Columbia," the Court specifically noted, *"includes all the legislative powers which a state may exercise over its affairs." Berman, supra,* 348 U.S. at 31, 75 S.Ct. at 102 (emphasis added). In delimiting the scope of judicial review in eminent domain cases, the *Berman* Court referred to the narrow role that courts play in reviewing *state* legislation:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . *or the States legislating concerning local affairs.* . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman, supra, 348 U.S. at 32, 75 S.Ct. at 102 (emphasis added). In light of the firm language in *Berman,* I believe that it is not within our province to usurp the role of Hawaii's legislature.

The rule of deference was also set forth in *Welch, supra,* a case that preceded *Berman.* A commentator has remarked:

> [I]t could be argued that the Court in *Welch* was reserving to itself a greater discretion to review the acts of state legislatures in this area, but it seems clear that the reserve power of the state in this area is greater than the power of the federal government when the federal government is acting within the boundaries of a state (in *Welch* the federal government condemned land in a state).

Hawaii's Land Reform Act, supra, at 37. Finally, *Gettysburg Electric Railway, supra,* 160 U.S. at 680, 16 S.Ct. at 429, cited with approval the rule "that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." The Court in *Gettysburg* borrowed that rule from a standard work on municipal corporations—hardly a repository of lore about judicial review of congressional action.

The majority is unquestionably correct that it lies with the judiciary to make the ultimate determination of whether a use is public. This is merely a restatement of the principle of judicial review established in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). However, the majority is sadly mistaken if it believes that a restatement of the obvious negates the rule of judicial deference in eminent domain cases.

B. The *Fallbrook* Approach

The majority's approach to reviewing the taking issue comes closer to the mark when it states, "we must look at each case on an ad hoc basis," and quotes the language in *Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 159-60, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896), "[W]hat is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." Unfortunately, the majority never analyses this case on the basis of its own particular facts and circumstances. Instead, the majority applies five mechanistic rules, described as "recurring facts and circum-

stances," derived from other cases. But general propositions do not decide concrete cases.

Before further considering the majority's wrong approach, it is instructive to consider the right approach of *Fallbrook Irrigation District, supra.* In that case, California had passed a law allowing irrigation districts to condemn property. In upholding the law, the court said:

> [I]n a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that State on this question.

Id. at 160, 17 S.Ct. at 64. *Fallbrook* is significant in two respects. First, in its emphasis on facts and circumstances, *Fallbrook* points to the significance that the shortage of water, an important state resource, has in determining whether a use is public. Second, *Fallbrook* stresses that the people of a state and members of her legislature have more familiarity than have strangers with the circumstances that justify a taking.

The reasoning in *Fallbrook* was reiterated in *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905). *Clark* upheld

a Utah law that gave individual landowners the right to condemn surrounding private land to irrigate their own private land. Shortage of water in Utah also helped to justify the taking. The court again emphasized that peculiar conditions may exist in a particular state, and that great deference is due to the knowledge that a state's citizens possess about local conditions:

> Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them.

Id. at 367-68, 25 S.Ct. at 678. Similarly, the state courts and legislature of Hawaii must be assumed to be exceptionally familiar with the land shortages in Hawaii and to have an informed understanding of social and economic consequences that result from this peculiar fact. A review of the Hawaii legislature's findings in this regard is illuminating.

C. The Facts of the Case

In Hawaii, a special problem exists that did not exist in eighteenth century America: Land in that state is concentrated under the suzerainty of a few large landowners. The legislature of Hawaii has specifically found:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development had been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

1975 Haw.Sess.Laws Act 184 § 1, *cited* in *Midkiff v. Tom*, 471 F.Supp. 871, 876 n. 21 (D.Hawaii 1979). The Trustees as a group are the single largest private landowner on Oahu. They own 15.1% of all land and 22.1% of all privately owned land on the island. *Midkiff v. Amemiya*, Civil No. 47103 (Haw.Ct.App.1978). *Findings of Fact and Conclusions of Law*, June 29, 1978. Much of Hawaii's population is concentrated on the island of Oahu, the island on which Hawaii's most populous city, Honolulu, is located.

The legislature has specifically found that the concentration of land, coupled with the large landowners' policy of leasing rather than selling that land, has undesirable economic and social effects. Among the undesirable economic effects are

artificially high prices on leasehold units, the discouragement of the development of fee simple units, inequality of bargaining power that strongly favors the lessor in rental negotiations, and a decline in leasehold values after the renegotiation of leases. 1975 Haw.Sess.Laws Act 184 § 1(d).

The legislature has also found that residential leaseholds have undesirable social effects. In particular, the pattern of renegotiating leaseholds at ever higher and inflated prices aggravates

> the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

Id., 184 § 1(e).

The Hawaii legislature's findings and declaration of purpose are eloquent testimony to the need for a land reform program that will give persons an opportunity to own their own land. The following are excerpts from Hawaii Rev.Stat. § 516-83 (1976):

> There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;
>
> The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;
>
> Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are

situated[.] . . . Long-term leases . . . contain terms and conditions . . . that restrict their freedom to fully enjoy such land . . .;

The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated . . .;

. . . [T]he ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State;

. . . For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii . . .;

The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers

the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few

. . . .

. . . Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. . . .

The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii. . . .

. . . The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. . . .

The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose. . . .

Legislation providing to people who are lessees under long-term leases of residential land on which their homes

> are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

The majority calls none of these findings of fact into question. Indeed, they are scarcely mentioned at all in the majority opinion. They persuade me, however, that the land reform statute which they prompted is well within constitutional limitations. The Hawaii legislature believes that the redistribution of land is necessary to curb inflation, to meet the housing needs of the elderly, and to allow citizens of the state to enjoy fully the land on which their houses are situated. These substantial economic and social goals are legitimate state interests. Given the peculiar facts of land distribution in Hawaii, it cannot be said that the redistribution of land in that state is an arbitrary or capricious means of achieving these interests. I would hold that where property is taken to achieve such substantial benefits for the citizenry, the property is put to a public use.

D. *Eastern Sugar Associates*

A case very much on point is *People of Puerto Rico v. Eastern Sugar Associates, supra.* That case upheld the constitutionality of a statute similiar to the Hawaii Land Reform Act.

Relying directly on Laws of Puerto Rico Annotated, tit. 28, ch. 31 §§ 241, *et seq.*, a commentator has outlined the purposes of the Land Law of Puerto Rico:

> The Puerto Rican Legislature passed the Land Law of Puerto Rico which was designed to break up the corporate latifundia (i.e. large landed estates) in order to improve the economic, political, and social health of the Islands. An Authority was created under the provisions of the Law and was given the power to condemn land. The Authority was instructed to carry out the purposes of the Law by (1) breaking up the latifundia and preventing their reappearance, (2) assisting in the creation of a new class

> of landowners and farmers, (3) providing means for the *agregados* and slumdwellers to *acquire parcels of land on which to build their homes,* and (4) taking all actions necessary to achieve the most economic, scientific, and efficient enjoyment of land by all of the People of Puerto Rico. Later the Legislature passed the Vieques Law which directed the Authority to acquire the land of Eastern Sugar Associates on the Island of Vieques.

Hawaii's Land Reform Act, supra, at 38 (footnotes omitted). *Agregados* were heads of families dwelling on land that they did not own.

The Authority filed in a Puerto Rican court a petition to condemn the land of Eastern Sugar Associates. After removal of the case on diversity grounds, the district court dismissed the petition for condemnation. The appeal presented the issue: "[W]hether on the pleadings it can be said that the appellees' land is sought to be taken for a public use." 156 F.2d at 320.

The court in *Eastern Sugar Associates* gave great deference to the determinations of the Legislature of Puerto Rico: "We are not, of course, concerned with the wisdom, expediency, or even directly with the necessity of the uses for which the land is proposed to be taken. These are legislative questions with which it is clearly established we have nothing whatever to do." 156 F.2d at 323.

While giving deference to the Puerto Rican Legislature, the court recognized:

> Some public benefit or advantage must accrue from the transfer and mere financial gain to the takers is not enough, since the Supreme Court has intimated that the power of eminent domain cannot be used by the taking authority in aid of "an outside land speculation." . . . But the local Legislatures nevertheless have wide scope in deciding what takings are for a public use.

Eastern Sugar Associates, supra, at 323.

The deference owed to the Puerto Rican Legislature, like that owed to Congress when it acts in the District of Columbia,

see Berman v. Parker, supra, is easily explained: Congress conferred powers on the Puerto Rican Government which are "nearly, if not quite, as extensive as the general, residual powers of a state." *Eastern Sugar Associates, supra,* at 322.

The majority, attempting to distinguish *Eastern Sugar Associates,* makes much of the individual uses described in the Puerto Rican legislation to argue that the land that was taken underwent a change in use. However, the court in *Eastern Sugar Associates* refused to consider individually the particular uses:

> Each use plays a part in a comprehensive program of social and economic reform. *Thus we see no basis for analyzing each case separately. Instead we think the entire legislation should be regarded "as a single integrated effort," . . . to improve conditions on the island,* and so viewed we think enactment of the statutes within the power of the Insular Legislature.

Id. at 316 (citation omitted and emphasis added).

The court in *Eastern Sugar Associates* rejected the argument "that due process is denied because the purpose for taking the appellees' land is only to sell or lease it to others for them to use personally instead of for use by the general public." *Eastern Sugar Associates, supra,* at 316. The court found that this argument had already been rejected several times in Supreme Court cases: *Rindge Co. v. Los Angeles,* 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Vernon Cotton Co. v. Alabama Power Co.,* 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *Strickley v. Highland Boy Mining Co.,* 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); *Clark v. Nash, supra; Fallbrook Irrigation District, supra.*

E. The Majority's Incorrect Approach

Even though the taking clause speaks of "public use," language that is broad in scope and not encompassed by a check list, and even though the precedents require an *ad hoc* approach, the majority nevertheless propounds five tests,

drawn, it says, from the cases, by which to determine whether the use here is public. I turn now to a brief examination of the majority's check list:

1. *Historically accepted public use.* This test is helpful only in those simple cases that represent no expansion of past public uses. But as the majority itself recognizes, the law of eminent domain had very humble beginnings in mill acts and in the building of roads. The history of public use has been a history of the expansion of the concept to accommodate new circumstances. Eminent domain has been used to condemn slum areas, *Berman v. Parker, supra;* to distribute land to squatters, *People of Puerto Rico v. Eastern Sugar Associates, supra;* and to condemn a football league franchise, *City of Oakland v. Oakland Raiders, Ltd., supra.*

2. *Change in the use of land.* The majority acknowledges that the Hawaii Land Reform Act may change the use of land; after condemnation, the land would be used exclusively for residential rather than investment purposes, and persons who own land outright are likely to treat it differently than tenants would. Maj. op., *ante,* at 796-797. The majority then offers the non-sequitur that these "alleged changes in use . . . are simply different forms of *private* use."

This argument by label, namely, that the change in use is merely a change in private use, conceals a serious confusion. The word "use" is susceptible to two entirely different meanings, namely, "employment" and "advantage."

There may be a change in private use, in the sense of a change in the private employment of land, such that a public advantage is conferred sufficient for the courts to hold that the land is now put to public use: the new private use in which the land is employed yields a public advantage. This occurred, for example, in *Clark v. Nash, supra,* a case in which an individual condemned private land to irrigate his own land. To dismiss an actual change in use as a mere change in "private use" is to ignore the possibility that a public advantage is thereby gained. The issue is whether the public advantage gained by a change in the private employment of land yields a public use.

3. *Change in possession.* The majority notes that a change in possession commonly occurs after a taking, then promptly cites two cases that undermine the rule.

In the instant case, continuous possession by the housing tract leaseholders is significant only because it favors their equities by diminishing possible hardships to the property owner. Whatever hardships might specifically burden a property owner who loses possession of house and land cannot be present in this case.

4. *Taking by the government.* The ultimate beneficiary of a valid taking is not the government: it is always the public. A taking by the government merely provides some insurance that it will be the public who benefits. To be sure, there is a danger, to which the courts must be alert, when the power of eminent domain is delegated to a private corporation. *United States v. Gettysburg Electric Ry. Co., supra,* 160 U.S. at 680, 16 S.Ct. at 429.

In the instant case, however, the state has not delegated authority to a private corporation. Indeed, insurance that the public will benefit is provided by the Hawaii Land Reform Act, which requires the Hawaii Housing Authority, a governmental body, to find that the purposes of the Act will be effectuated by a taking, and which vests discretion in the Authority, not in private individuals. Haw.Rev.Stat. § 516-22.

5. *De minimis taking.* The majority notes that courts have upheld the condemnation of land where the taking is *de minimis* and for the purpose of facilitating the development of nearby land. The majority cites two cases. Need one add that courts have upheld numerous takings that were not *de minimis?*

The sovereign powers of a state exist to promote the health, welfare, security and happiness of the people of this state—in sum, to promote the public interest. Whether the Hawaii Land Reform Act has been wisely chosen as a means for achieving the legislature's objectives is not for us to say.

> Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 564, 31 S.Ct. 259, 261, 55 L.Ed. 328 (1911).

CONCLUSION

I believe that the land reform program enacted by the Hawaii Legislature does not result in an unlawful taking of property. I also believe, however, that instead of reaching the merits of this question, the majority should have abstained in favor or ongoing state judicial processes. On both grounds I therefore register my dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
D. HAWAII

Dec. 19, 1979

Civ. No. 79-0096

Frank E. MIDKIFF, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki and Myron B. Thompson, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

—v.—

Paul A. TOM, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N. C. Ing, Nobuyoshi Tamura, Andrew I. T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority; Franklin Y. K. Sunn, Executive Director of the Hawaii Housing Authority; and Hawaii Housing Authority,

Defendants,

—and—

Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahaione Valley Community Association, Inc.; Kamiloiki Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association, Inc.;

Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund and Halawa Valley Estates Fee Conversion Corporation,

Intervenors.

AMENDED MEMORANDUM DECISION

SAMUEL P. KING, *Chief Judge.*

The Trustees of the Estate of Bernice Pauahi Bishop[1] filed suit in this Court on February 28, 1979, against the Commissioners and Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority itself, claiming the Hawaii Land Reform Act, now chapter 516 of the Hawaii Revised Statutes, was unconstitutional. Chapter 516 allows the State to use the power of eminent domain in order to condemn certain residential land and then sell it to the residential lessees. The Hawaii Housing Authority is given the power and duty to carry out the provisions of chapter 516.

In Hawaii, a few landholders, including the Bishop Estate, own large tracts of residential land. It has been the policy of these landholders to offer long-term leases to individual lessees, rather than to offer residential lots in fee. Although in recent years some of the leased land has been sold to individual lessees, much of the land is still not available for purchase. The Legislature of the State of Hawaii viewed this system of landholding as injurious to the well-being of the people of Hawaii, and adopted chapter 516 in order to allow long-term residential leaseholders the opportunity to buy in fee the land they occupy under a lease.

One of the provisions of chapter 516 provides for a compulsory arbitration procedure that sets the compensation to be

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1 In 1887 Princess Bernice Pauahi Bishop, the last lineal descendant of King Kamehameha the Great, established by Will the Kamehameha Schools/Bishop Estate. The Estate is a perpetual educational trust for the support of two schools, one for boys and one for girls, known as the Kamehameha Schools.

paid the fee owners when the land is condemned. A broad temporary restraining order was issued by me on February 28, 1979, and a modified temporary restraining order, enjoining only the implementation of the mandatory arbitration provisions of the statute, was issued on March 27, 1979. A preliminary injunction, declaring those provisions unconstitutional was issued on May 8, 1979. D.C., 471 F.Supp. 871. In my opinion of May 8, 1979, I indicated that the remainder of chapter 516 was probably constitutional. Plaintiffs' constitutional challenge to the remainder of the statute is that the taking of property for the purpose of reselling it to the residential lessees is not for a public purpose, and hence violative of the Fifth Amendment command "[N]or shall private property be taken for public use, without just compensation."

Plaintiffs have urged this Court to conduct a trial, weigh evidence, and make what is in essence an *a priori* determination of whether the takings authorized by chapter 516 are for a public use. Plaintiffs intend to show that each and every legislative rationale for the statute is wrong.[2] They claim that if all the economic justifications for the statute are disproved, all that is left are social justifications—such as the social engineering goal of land redistribution. These social goals, contend the plaintiffs, cannot alone justify the taking as being for a public use. Plaintiffs concede that the legislative findings as to the economic justifications for the statute should be given deference, but argue that the standard for determining whether the taking is for a public use is *not* whether the legislative findings have a rational basis. They do not point to any particular standard to be used by the Court, except to say that the Court must make a new judicial determination. The plaintiffs indicated at oral argument that they view the question of whether the taking is for a public use as an economic and factual question rather than a legal one.

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2 Haw.Rev.Stat. § 516-83 (1976) contains a long list of legislative findings and declarations of purpose and necessity relating to chapter 516.

This Court disagrees. I must make a judicial determination of whether the taking is for a public purpose, but that determination is limited in scope to the question of whether the plaintiffs were denied substantive due process. The goal, the purpose, the *raison d'être* of the statute must be within the purview of the State's police power, and the means chosen by the Legislature to achieve that goal must not be arbitrary, capricious, or in bad faith. If the Court determines (1) that *any* possible rationale for the statute, expressed or not, is within the bounds of the State's police power, and (2) that the statute is not arbitrary or the product of legislative bad faith, then the statute is constitutional.

The starting point in any legal analysis is *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). In that case the Supreme Court held constitutional the District of Columbia Redevelopment Act of 1945. That Act provided for the comprehensive use of the eminent domain power to redevelop slum areas, and also provided for the possible later sale or lease of the condemned lands to private interests. The Court discussed whether the takings authorized by the Act were for a public purpose.

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citation omitted] or the States legislating concerning local affairs. [citations omitted] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. [citations omitted]
>
> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

348 U.S. at 32, 75 S.Ct. at 102. The Supreme Court viewed the question of whether the takings were for a public purpose in the same way that it viewed any substantive due process claim. The key question was whether the object of the statute was within the police power authority of the legislature.

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. [citations omitted] Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

348 U.S. at 33, 75 S.Ct. at 103.

Some courts have taken an extremely narrow view of the judiciary's role in determining whether a taking is for a public purpose. In *United States v. 416.81 Acres of Land*, 514 F.2d 627 (7th Cir. 1975), Mr. Justice Clark was considering a claim that a taking was not for a public purpose because it was in aid of a commercial project.

> Though appellant's statement pieces together and rewrites different grounds from different objections, we will accept his version as the strongest presentation of his dual claims that the proposed taking was not for a public purpose and was arbitrary and capricious. Even under these circumstances, however, he has not alleged any sufficient defense. ***The only question for judicial review in a condemnation proceeding is whether the purpose for which property was taken is for a Congressionally authorized public use.*** [citations omitted] It is not for the courts to review the necessity of the taking. [citations omitted] Nor is it for the courts to consider broadside allegations

> that the purported public use to be served is merely a pretense or a sham to cover arbitrary official conduct. [citations omitted] Only in cases of egregious bad faith will the right to condemn be denied [citation omitted] for in those circumstances the taking may not be for a "public" use at all.

514 F.2d at 631-32 (emphasis added). Justice Clark's view was that courts could nullify a taking as not being for a public use *only* in the case of bad faith. There is no bad faith alleged in this case, and were this Court to adopt Justice Clark's test, the inquiry into the constitutionality of the statute would end immediately. However, some cases in this Circuit have indicated that judicial review may extend to the question of whether the taking is arbitrary and capricious.[3]

There are cases similar to Justice Clark's that indicate judicial inquiry ends when it is determined that a taking is for a Congressionally authorized use,[4] other cases that indicate inquiry is limited to determinations of bad faith or arbitrary action,[5] still others that say police power/due process standards are to be used in determining whether a taking is for a public purpose,[6] and even cases that pay lip service to the

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3 *See Southern Pacific Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030, 87 S.Ct. 1478, 18 L.Ed.2d 592 (1967); *United States v. 18.2 Acres of Land*, 442 F.Supp. 800 (E.D. Cal. 1977).

4 *See, e.g., United States v. 255.25 Acres of Land*, 553 F.2d 571, 572-73 n. 2 (8th Cir. 1977).

5 *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058-59 (7th Cir. 1973); *United States v. Agee*, 322 F.2d 139, 142 (6th Cir. 1963) (language of case somewhat unclear but seems to indicate that judicial determination of public purpose is limited to questions of bad faith or arbitrary action); *Amen v. City of Dearborn*, 363 F.Supp. 1267, 1278 (E.D.Mich. 1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976) ("We note that the court has no power to go beyond a determination that the legislative body has acted in bad faith or in an arbitrary manner").

6 *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946); *United States v. 67.59 Acres of Land*, 415 F.Supp. 545, 548-50 (M.D.Pa.1976).

proposition that a government taking for the purpose of transferring condemned property to private hands is not necessarily for a public purpose.[7]

After carefully considering all these cases, the Court has determined that the proper test to be used is that suggested by *Berman*—a police power/due process analysis. It would be irrational to have all government interferences with property rights except eminent domain judged by a substantive due process test, while eminent domain is judged by something else--whether stricter or not. Plaintiffs have cited many cases for the proposition that courts have great latitude in making judicial determinations of what is a public use. These cases, however, were almost all decided before 1930. At that time, to say the least, it took very little to invalidate a statute on substantive due process grounds. On the other hand, I believe those courts that say judicial review is extremely limited do so because they cannot conceive of legislative actions that are neither arbitrary nor in bad faith, yet still outside the limits of the police power. If the object of chapter 516 (or any one of several objects) is to further the health, safety, morals, or general welfare of the people of Hawaii, and if the means chosen to accomplish that object are rational and not in bad faith, the statute is constitutional.

Hawaii, as discussed earlier, has an uncommon system of landholding. A substantial part of all residential land is held by a few interests and leased to a large number of residential lessees. Plaintiffs, Trustees of the Bishop Estate, hold a significant portion of the residential land on Oahu. Section 516-83 of the Hawaii Revised Statutes is entitled "Legislative findings and declaration of necessity; purpose" and in it the Legislature sets forth numerous economic and non-economic rationales for

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7 *Washington-Summers, Inc. v. City of Charleston*, 430 F.Supp. 1013, 1014-15 (S.D.W.Va.1977) ("[I]t is equally clear that property cannot be taken by eminent domain for a predominantly private purpose"); *Amen v. City of Dearborn*, 363 F.Supp. 1267, 1279 (E.D.Mich.1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976) ("[I]ndustrial and commercial use by itself does not constitute a public purpose").

chapter 516. Plaintiffs argue that they can demonstrate that all the economic justifications for the statute are incorrect, and that the Legislature was wrong in enacting the statute. Yet, in order to uphold the constitutionality of chapter 516, this Court believes all it need do is look at the broadest possible rationale for the statute—that of redistributing residential land and changing the pattern of residential ownership in Hawaii. I believe this purpose is within reach of the police power, and hence the takings authorized by the statute are for a public purpose. All that the Court need rely on in the way of evidence to support this conclusion is the system of landholding in Hawaii—the concentration of land in a few large landholders. At the preliminary injunction hearing, there was testimony and documentary evidence concerning the way land is held in Hawaii. The Court believes that given this system of landholding, the Legislature had the right, pursuant to its police power, to conclude that the general welfare of the people of Hawaii was served by condemning the land of large landholder-lessors and allowing the lessees to purchase that land from the State. The Legislature had the right to conclude that Hawaii's system of landholding was injurious to the social and economic health of the community.

In *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946), the Legislature of Puerto Rico enacted the Land Law of Puerto Rico, a far-reaching program of agrarian reform that provided for the condemnation of privately owned land, and for its sale to private parties for residential use and farming. The Vieques Act, also passed by the Legislature of Puerto Rico, provided for the acquisition of land on two outlying islands for the purpose of renewing their sugar industry and establishing a distillery. Pursuant to these Acts, Puerto Rico petitioned the court to condemn 3100 acres of land held by Eastern Sugar Associates. Eastern Sugar challenged the condemnation, claiming the taking was not for a public purpose. The court first concluded that the test for determining public use was a due process test—not some *a priori* judicial determination of public purpose. The court

noted that "a taking of property from one, for the purpose of transferring it to another, without anything more, [does not necessarily conform] to due process of law." 156 F.2d at 323. However, all that was needed was "some public benefit or advantage" other than mere financial gain for the state. *Id.* The court then went on to note:

> In the first place a state's power of eminent domain does not necessarily have to be rested upon the ground that the taking is considered necessary for the public health, but may be exercised if the taking "be essential or material for the prosperity of the community." [citation omitted] And in the second place a local Legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity. . . . This [program] may be, as the appellees contend, "state socialism." But concrete cases are not to be decided by calling names. Our function is to pass upon the statutes before us without regard to our views of the wisdom of the political theory underlying them; [citation omitted] it is our duty to determine whether their enactment rested upon arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist.

156 F.2d at 324. In this case, the purpose of the statute is in no way to confer immediate monetary gains upon the State as some sort of land speculator. Looking only at one social goal of the legislation—that of redistributing the land—this Court could never say, regardless of how much "evidence" was presented by the plaintiffs, that the Legislature's belief in the social evils to be combated by chapter 516 was arbitrary. Social benefit alone is enough to bring a statute within the purview of the police power. It is true that the Puerto Rico statutes were a broader effort on the part of the Puerto Rican Legislature than was chapter 516 on the part of the Hawaii Legislature. It is true that the Puerto Rico statutes were more comprehensive

than chapter 516, and were enacted to combat what were perhaps more serious evils. Yet, it is the Legislature's province to determine just how far to go in trying to solve a problem or a series of problems. There are limits to legislative line drawing—those imposed, by, *inter alia,* the equal protection clause—but those are not at issue in this case. What is at issue is the right of the Legislature to conclude, as it did, "The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii." Haw.Rev.Stat. § 516-83(10) (1976).

In *Government of Guam v. Moylan,* 407 F.2d 567 (9th Cir. 1969), the court was considering a Guam redevelopment plan. Prior to World War II, Agana, the capital of Guam, was a patchwork of streets and lots going every which way. Agana was almost completely destroyed in the war, and the government decided to rebuild it. The government wanted, however, to have straight streets and lots. In order to achieve this goal, it condemned land simply to force consolidation of the odd lots. Its purpose was not to hold the land for any particular reason, but rather to sell the new even lots, after condemnation, to private individuals. The Ninth Circuit found that this constituted a public purpose. It is difficult for this Court to see how condemning land to have even streets is more for a public purpose than condemning land so that a large number of long-term lessees can have the opportunity to own the land they live on. Certainly the Hawaii Legislature's determination that the social well-being of the people of Hawaii is served by land redistribution is entitled to as much deference as was given the determination that the social and/or economic well-being of the people of Guam was served by having straight streets.

If the goal of the statute—that of land redistribution—is within the ambit of the State's police power, then the only remaining question for the Court is whether the means chosen to achieve that goal are arbitrary. There has been no suggestion by the plaintiffs that if land redistribution is a public purpose

the statute is nonetheless arbitrary. There are of course some lines drawn, but line drawing is always necessary in social legislation, and the scope of the Court's review of where those lines are drawn is very narrow. This Court finds that the Legislature's determinations of what land is subject to condemnation and who is entitled to repurchase from the State are in no way arbitrary or capricious.

Even were this Court's view that land redistribution constitutes a permissible public purpose encompassed by the police power incorrect, the Legislature has propounded many economic justifications for the statute. The following are excerpts from Haw.Rev.Stat. § 516-83 (1976).

> [S]erious shortage of fee simple residential land . . . .
>
> [A]rtificial inflation of residential land values in the State . . . .
>
> [T]he people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated . . . .
>
> [The leases] restrict their freedom to fully enjoy [their] land and . . . are weighted heavily in favor of the few landowners of such land . . . .
>
> [T]he economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values . . . .
>
> If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values. . . .
>
> Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to

> purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention . . . will help satisfy the pressing public necessity for a secure, strong and stable economy. . . .
>
> The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purpose of this chapter.

These are just some of the justifications for the act that are set forth in § 516-83. There is no doubt at all that these economic rationales, such as lowering prices and curbing inflation, are clearly encompassed by the police power. This has been the law of the land since the New Deal. The only question for judicial consideration is whether the means chosen by the Legislature to achieve these goals—chapter 516—is arbitrary. In order to prevail, plaintiffs must demonstrate that the statute is arbitrary with respect to every possible economic rationale for the statute—stated and unstated. Plaintiffs have indicated that they could call many witnesses to show that the Legislature was wrong—that chapter 516 will not lower prices, curb inflation, or do anything else to help the people of Hawaii. Yet, it is not this Court's function to determine if the Hawaii Legislature was wrong. It is this Court's job only to determine whether the Hawaii Legislature acted arbitrarily in enacting chapter 516. No matter how much evidence plaintiffs were to present, they could not establish that the Legislature was arbitrary with respect to every economic rationale advanced in support of the statute. The Legislature determined that chapter 516 would bring down prices, and in our system of government that determination is for them and them alone to make. There are limits to judicial deference, but those limits are not even approached in this case. The Legislature simply came up with a plan to improve the quality of life in Hawaii. Whether it was right or wrong is up to the voters, not this Court.

Since the question of whether the takings authorized by chapter 516 are for a public purpose is a legal one, and since this Court has made its determination, there is no point in this case proceeding any further on this issue. Defendants are entitled to summary judgment on the issue of the facial constitutionality of chapter 516, subject to this Court's prior rulings on the statutory provisions relating to mandatory arbitration and just compensation.

Defendants may prepare an appropriate order.

APPENDIX C

UNITED STATES DISTRICT COURT
D. HAWAII

May 8, 1979

Civ. No. 79-0096

Frank E. MIDKIFF et al.,

Plaintiffs,

—v.—

Paul A. TOM et al.,

Defendants,

—and—

Wai-Kahala Tract "H" Association, Inc., et al.,

Intervenors.

DECISION ON MOTION FOR PRELIMINARY INJUNCTION

SAMUEL P. KING, *District Judge.*

The Trustees of the Estate of Bernice Pauahi Bishop[1] filed suit in this court on February 28, 1979, against the Commis-

1 Plaintiffs refer to themselves as "Trustees of the Kamehameha Schools/Bishop Estate." The Kamehameha Schools were established in accordance with the wishes of Princess Bernice Pauahi Bishop as expressed in her will. The named plaintiffs are trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, appointed as such by the Supreme Court of Hawaii. *See Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973), *cert. denied, sub nom. Kekoa v. Richardson*, 417 U.S. 930, 94 S.Ct. 2641, 41 L.Ed.2d 233 (1974). The testamentary trust is commonly referred to as the Bishop Estate.

sioners and Executive Director of the Hawaii Housing Authority[2] and the Hawaii Housing Authority[3] itself, praying for a declaration that the Hawaii Land Reform Act[4] be declared unconstitutional.

A temporary restraining order against implementation of mandatory arbitration was granted pending a hearing and decision on a preliminary injunction.[5] That hearing was held on April 24-27, 1979.

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2 The Commissioners and Executive Director are sued in their individual and official capacities.

3 The Hawaii Housing Authority is "a public body and a body corporate and politic with perpetual existence" which is "placed within the department of social services and housing for administrative purposes." Haw.Rev.Stat. § 356-5(a) (1976). The authority is charged generally with the duty of carrying out the State's responsibilities under state and federal statutes with respect to housing. Haw.Rev.Stat. § 356-7 (1976).

4 1967 Haw.Sess.Laws Act 307, as amended by 1968 Haw.Sess.Laws Act 46, 1969 Haw.Sess.Laws Act 203, 1971 Haw.Sess.Laws Act 215, 1972 Haw.Sess.Laws Act 2, 1975 Haw.Sess.Laws Acts 184, 185, and 186, 1976 Haw.Sess.Laws Acts 159, 200, and 242, and 1978 Haw.Sess.Laws Act 140. These acts are set forth in Haw.Rev.Stat. ch. 516 (1976). *See also:* Haw.Rev. Stat. ch. 519 (1976). Plaintiffs attack specifically the provisions of § 516-1(14) (defining "owner's basis"), §§ 516-22 to 24 (authorizing condemnation), and §§ 516-51 to 55 (providing for mandatory arbitration).

5 A temporary restraining order was issued on February 28, 1979, in the form requested by plaintiffs. Upon reflection, I determined that this order was too broad. At a subsequent conference with counsel, I announced *sua sponte* that I would modify this order to make it clear that steps preliminary to arbitration were not enjoined. The Order Modifying Temporary Restraining Order was entered on March 27, 1979. By stipulation between plaintiffs and (then) defendants dated February 28, 1979, and entered as an order of the court on March 2, 1979, the expiration date of the temporary restraining order was extended from March 10, 1979, to March 14, 1979. A further extension from March 14, 1979, to April 24, 1979, was similarly stipulated to on March 7, 1979, and entered as an order of the court on March 9, 1979. A motion filed on March 20, 1979, by the O'Connor Intervenors to dissolve the temporary restraining order or in the alternative for security in the amount of $1,000,000 was denied on March 27, 1979. A motion filed on March 20, 1979, by the Bays Intervenors to modify the temporary restraining order was in effect denied on March 27, 1979, by the court's *sua sponte* modification in different language.

Motions to intervene were filed by several Bishop Estate lessee organizations.[6] All motions were granted on March 23, 1979.

At this stage of the proceedings, the evidence adduced and arguments presented concentrated on the facial constitutionality of Chapter 516 of the Hawaii Revised Statutes.[7] Some evidence related to the actual application of the law, but this was limited to setting the context within which the law was supposed to operate.[8] For purposes of the hearing, it was

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6 On March 7, 1979, by WAI-KAHALA TRACT H ASSOCIATION, INC.; HALAWA HILLS LANDSALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION; ENCHANTED HILLS, UNIT I; PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE-IKI COMMUNITY ASSOCIATION; and WAIAU COMMUNITY ASSOCIATION, all represented by Hoddick, Reinwald, O'Connor & Marrack, hereinafter sometimes referred to as the O'Connor Intervenors.

On March 8, 1979, by KAHALA COMMUNITY ASSOCIATION, INC.; and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND, represented by Carlsmith, Carlsmith, Wichman and Case, hereinafter sometimes referred to as the Bays Intervenors.

On March 12, 1979, by HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION, represented by Kemper & Watts, hereinafter sometimes referred to as the Watts Intervenors.

7 It was not deemed appropriate to attempt to consolidate the hearing on the preliminary injunction with the hearing on the merits, as all parties desired to engage in extensive discovery. While much discovery can probably be avoided by pretrial conferences with the court, certain basic constitutional issues can be addressed immediately on stipulated facts with only limited testimony.

8 The Bishop Estate is an eleemosynary testamentary trust. The statute in question applies in terms to "all lands leased as residential lots which are owned or held privately or owned by the State or its political subdivisions, except Hawaiian home lands . . . and lands owned or held by the federal government." Haw.Rev.Stat. § 516-2 (1976). For purposes of this hearing, no distinction is made as to the power of the legislature to legislate with respect to the land holdings of a perpetual eleemosynary trust as opposed to the land holdings of private individuals.

agreed that the court could take as true the legislative findings set forth from time to time when this and related laws were enacted or amended.[9]

Chapter 516 authorizes the use of the State's power of eminent domain to permit lessees of residential lots to acquire the fee simple title to their homes.[10] The Hawaii Housing Authority is given the power and duty to carry out the provisions of this chapter.[11] The Authority established the position of Land Reform Administrator to handle this function and adopted regulations implementing the statute.[12]

The Trustees object to the application of this land reform statute to the Bishop Estate lands on three principal grounds. First, they say that the State's power of eminent domain cannot constitutionally be used for the intended purpose in that the benefits derived from such use inure solely to private individuals.[13] Second, they say that the statute unconstitu-

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9 Especially, the legislative findings in 1967 Haw.Sess.Laws Act 307 § 1, 1975 Haw.Sess.Laws Act 184 § 1, and 1975 Haw.Sess.Laws Act 186 §§ 1 and 2. 1975 Haw.Sess.Laws Act 186 § 2 is set forth in Haw.Rev.Stat. § 516-83 (1976). For the language of these findings, *see* note 21, *infra*.

10 Haw.Rev.Stat. §§ 516-21 to 45 (1976).

11 Haw.Rev.Stat. §§ 516-6 and 7 (1976).

12 Rule 10 of the Department of Social Services and Housing, Hawaii Housing Authority, State of Hawaii, approved by Governor John A. Burns on November 1, 1968, after a public hearing as required by Haw.Rev.Stat. ch. 6C (1955) (now Haw.Rev.Stat. ch. 91 (1976)), and subsequently amended to reflect statutory changes. The present AMENDED RULE 10 is entitled: A REGULATION PERTAINING TO THE HAWAII HOUSING AUTHORITY OF THE DEPARTMENT OF SOCIAL SERVICES AND HOUSING, IMPLEMENTING ACT 307, SESSION LAWS OF HAWAII, 1967, AS AMENDED BY ACT 46, SESSION LAWS OF HAWAII, 1968; ACT 203, SESSION LAWS OF HAWAII, 1969; ACT 215, SESSION LAWS OF HAWAII, 1971; ACT 2, SESSION LAWS OF HAWAII, 1972; ACT 184 AND ACT 186, SESSION LAWS OF HAWAII, 1975; AND ACT 242, SESSION LAWS OF HAWAII, 1976.

13 Haw.Rev.Stat. § 516-30 (1976) provides for the sale to a lessee by the Hawaii Housing Authority of the leased fee interest to the lot leased by the lessee after the authority has acquired that leased fee interest. The lessee must qualify pursuant to Haw.Rev.Stat. § 516-33 (1976) and meet certain other requirements. This purpose of the law is spelled out in Haw.Rev.Stat. § 516-83(5) (1976) in the following language:

tionally mandates less than fair market value as compensation for the taking of the owner's leased fee interests.[14] Third, they

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> The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions [set forth in preceding subparagraphs] and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State.

If a lessee fails to purchase his leased lot, the authority becomes the lessor, subject to all the provisions of law applicable to lessors. Haw.Rev.Stat. §§ 516-30 and 31 (1976). Presumably the authority will not exercise its power to acquire a lessor's leased fee interest unless sufficient activity by lessees has taken place pursuant to Haw.Rev.Stat. § 516-22 (1976) and unless sufficient assurances of purchase by lessees have been received in the form of contracts to purchase as contemplated by Haw.Rev.Stat. § 516-30 (1976) and AMENDED RULE 10 § 17.

14 1967 Haw.Sess.Laws Act 307 provided in § 13 for payment upon condemnation of "the current fair market value of the tract diminished by the lessees' interests in the leased lots within the tract." A "lessee's interest" or "leasehold interest" was defined in § 2(h) to mean "the current fair market value of all on-site improvements, including all landscaping, walks, drives, walls, fences, buildings and betterments on the surface of the lot, paid for or required to be paid for by the lessee, plus the unamortized current replacement cost of all off-site improvements paid for or required to be paid for by the lessee, determined on the basis of current costs of installation of the same off-site improvements under the circumstances existing at the time of the original installation, and computed on a straight-line basis over the period of the lease, together with the lessee's value increment . . . ." The "lessee's value increment" was defined in § 2(i) to mean "the value of his interest in the residential use, enjoyment and amenities of the lot during the balance of the unexpired term of the lease, computed notwithstanding any provision to the contrary in the lease or any other contract; provided that such value shall in no event be less than ten per cent nor more than 15 per cent of the current fair market value of the unencumbered fee of the lot."

1968 Haw.Sess.Laws Act 46 in § 2e redefined the "compensation to be paid for the development tract" of Act 307 § 13 to be "the current fair market value of the tract, valued as if the fee title to the tract were unencumbered and the tract were undeveloped and unsubdivided, plus the unpaid balance owing to the lessor by lessees of the lots in the tract as reimbursement for the actual offsite improvement costs paid for by the lessor; provided, that in no event shall the compensation be less than the sum of the present worth of the future rental income stream under the leases to lots in the tract and the present worth of the lessor's reversionary interest in

say that the compulsory arbitration provisions of the statute violate constitutional guarantees.[15]

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the leased lots." This act also, in § 2b and c, deleted the earlier definitions of "lessee's interest" and "lesses's value increment" and substituted a definition of "off-site improvements" to mean "all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and underground electric cables, constructed or placed in a subdivision off the lots intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by occupants of all lots for whose benefits the improvements have been constructed or placed."

1975 Haw.Sess.Laws Act 184 again changed the provisions of Act 307 relating to compensation. Haw.Rev.Stat. § 516-24 (Act 307 § 13) was amended to provide that the "compensation to be paid for the leased fee interest in a residential houselot within a [development] tract shall be the owner's basis as defined in section 516-1(14)." "Owner's basis" was a new definition added to Act 307 § 2. This was defined as "the current fair market value of the lot excluding onsite improvements, valued as if the fee title were unencumbered, less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the lot, which replacement cost shall include an overhead and profit not exceeding twenty percent of the current replacement cost of the existing offsite improvements, or the original lot development credit to the lessee, whichever is greater, plus the unpaid balance, if any, owing to the lessor by the lessee as reimbursement other than as a part of the lease rent for the actual offsite improvement costs paid by the lessor." The definition of "offsite improvements" was expanded to make it explicit that "gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes" were included.

1976 Haw.Sess.Laws Act 242 made the final changes with which we are now concerned. "Owner's basis" was redefined as "the current fair market value of the lot." The definition then went on to provide that the "fair market value shall be established to provide the lessor with just compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value." The definition continued with language which on its face seems to mandate that this value "shall be determined by whichever following method provides just compensation and gives the greater consideration to the lessee's interest" and sets forth a method "(A)" (a discounted future rental income stream plus a discounted lessor's reversionary interest) and a method "(B)" (current market value less the lessee's interests). This act also provides for mandatory arbitration of compensation in advance of condemnation and that the "effect of the arbitration award and all matters relating thereto shall be prima facie evidence as to just compensation in any condemnation proceedings under this chapter." *See* note 24 *infra*.

15 Compulsory arbitration appears for the first time in 1976 Haw.Sess. Laws Act 242 § 4, adding a new Part IIA to Haw.Rev.Stat. ch. 516 entitled

In making a preliminary determination of these issues at this time, I am governed by the test enunciated in *Aguirre v. Chula Vista Sanitary Service,*[16] that is, that a preliminary injunction should issue " 'upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting preliminary relief.' "[17] I shall analyze each of the listed objections in the light of this teaching from *Aguirre.*

First, I am of the opinion that the State may use the power of eminent domain to redefine, rearrange, or redistribute interests in land.[18] Throughout recorded history, the manner in

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"MANDATORY ARBITRATION OF COMPENSATION" and consisting of five sections. Arbitration is instituted by the Hawaii Housing Authority if voluntary negotiations fail. In this event, assuming the required number of qualified lessees have applied to the authority to purchase the leased fee interest in their residential leasehold lots, "the Hawaii housing authority shall direct the lessor and lessee to submit to mandatory arbitration under chapter 658 [Hawaii's statute on agreements to arbitrate] to establish an amount of just compensation which shall be paid to lessor for the lessor's leased fee interest under section 516-24."

It is interesting to note that the House bill which ended up as Act 242 did not mention arbitration, the Senate amended to provide for arbitration by agreement, and the conference committee reported out a bill with the existing mandatory arbitration provisions.

16 542 F.2d 779 (9th Cir. 1976).

17 *Id.* at 781.

18 *See Clark v. Nash,* 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed.2d 1085 (1905) (upholding statutory authority given an individual in Utah to condemn an easement across another individual's land for the purpose of enlarging an irrigation ditch serving the condemnor's land); *Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906) (upholding statutory authority given a mining corporation in Utah to condemn a right of way for an aerial bucket line across a placer mining claim of another individual); *Mt. Vernon Cotton Co. v. Alabama Power Co.,* 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916) (upholding statutory authority given a power company in Alabama to condemn private property for its purposes); *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (upholding the District of Columbia Redevelopment Act of 1945); *People of*

which land is permitted to be held and used has been of critical importance to all members of a given society.[19] It is not enough to acquiesce in legislation that looks only to the future. The ingenuity of man could postpone the future to an unacceptable remoteness in time.[20]

Furthermore, the legislature has defined the public interest and the public purpose behind Chapter 516.[21] Whether or not

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Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir. 1946), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946) (upholding Puerto Rico's statutory program for redistribution of land based on the territory's power of eminent domain); *Government of Guam v. Moylan*, 407 F.2d 567 (9th Cir. 1969) (upholding Guam's urban redevelopment statute).

19 *See Public Land Policy in Hawaii: Major Landowners*, Legislative Reference Bureau, State of Hawaii, Report No. 3 (1967); *Public Land Policy in Hawaii: An Historical Analysis*, Legislative Reference Bureau, State of Hawaii, Report No. 5 (1969); *Green v. Frazier*, 44 N.D. 395, 176 N.W. 11 (1920), *aff'd*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878 (1920).

20 *See* 3 J. REEVES, HISTORY OF THE ENGLISH LAW 324-25 (2d ed. 1787).

21 1975 Haw.Sess.Laws Act 186 § 2 (Haw.Rev.Stat. § 516-83). The section reads as follows:

> Legislative findings and declaration of necessity; purpose. (a) The legislature finds that:
>
> (1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;
>
> (2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;
>
> (3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

the prohibition of the Fourteenth Amendment against depriving any person of property without due process of law is the

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(4) The economy of the State and public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State;

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living.

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

same as the prohibition of the Fifth Amendment against the taking of private property for public use without just compen-

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(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few.

(9) Land, in common with other natural resources, is of finite quantity, a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artificially inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this [chapter] is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii.

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this [chapter].

(12) The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose;

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State.

1967 Haw.Sess.Laws Act 307 §1 set forth the first legislative findings in this area as follows:

Findings and declaration of necessity The legislature finds that:

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article 1, section 2 of the State Constitution recognizes this goal when it states:

"All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of

life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . ."

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The term and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the

people of the State of a choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title to residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

Relevant legislative findings are also found in 1975 Haw.Sess.Laws Act 184 § 1, Act 185 § 1, and Act 186 § 1 as follows:

ACT 184 FINDINGS AND PURPOSE

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing

their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development has been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

(1) The scarcity of fee simple residential lands have [sic] pushed the price of fee simple residential units to high levels;

(2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

(3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

(4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;

(5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run; and

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements, which have already been paid for or will be paid for by the lessee and on the value accruing thereon;

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at $68,000 before renegotiation of lease rental was increased) [sic], causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

ACT 185 FINDINGS AND PURPOSES

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent

of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential household system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership "is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical".

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of

these increases has been to substantially increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as

determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g. a house appraised at $68,000 before renegotiation of lease rent has been appraised at $59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated above, the public health, safety, and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

ACT 186 FINDINGS AND PURPOSE

Act 307, Session Laws of Hawaii 1967, now Chapter 516, Hawaii Revised Statutes, was intended to lessen the adverse consequences of the excessive concentration of the fee title to lands in Hawaii in the hands of a few owners by allowing residential leaseholders to acquire the fee simple title absolute or otherwise, to real property they are leasing.

The legislature finds that although the Act has been in full effect for nearly six years it has not been implemented. Many reasons have been cited for the failure to put the Act into effect including possible legal or constitutional difficulties inherent in the original Act.

The purpose of this Act is to reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307 and to amplify and clarify those findings and declarations of necessity.

sation,[22] under either Amendment "public use" includes "public interest."[23]

Second, I am of the opinion that the statutory definition of "owner's basis"[24] raises serious constitutional questions. The

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22 *See Chicago Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 233-41, 17 S.Ct. 581, 41 L.Ed. 979 (1897); *Rodgers v. Tolson*, 582 F.2d 315, 318 (4th Cir. 1978); *Gordon v. City of Warren*, 579 F.2d 386, 389-90 (6th Cir. 1978); *O'Grady v. City of Montpelier*, 573 F.2d 747, 750 n. 8 (2d Cir. 1978).

23 *See The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949); *Nichols, The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615 (1940); *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936); *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 A. 834 (1938). *See also* cases cited in note 18, *supra*.

24 Haw.Rev.Stat. § 516-1(14)(1976). The definition reads as follows:

> "Owner's basis" means the current fair market value of the lot. The fair market value shall be established to provide the lessor with just compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value. The value shall be determined by whichever following method provides just compensation and gives the greater consideration to the lessee's interest:
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> (A) The sum of: (i) the future rental stream for the lot for the term of the lease discounted to present worth from the expiration date of the lease; and (ii) the value of the lessor's reversionary interest in the lot discounted to present worth from the expiration date of the lease. The discount rate shall be based on the maximum rate of return for insured passbook demand saving account paid by the savings and loan institutions in Hawaii plus three and three-fourths per cent; provided, however, that the discount rate may be modified by mutual agreement of the lessor, lessee, and the authority; or
>
> (B) The current fair market value of the lot, valued as if it were a fee simple lot and as if the fee title were unencumbered, and excluding onsite improvements, established by a market data approach utilizing comparable sales, less the following:
>
> (i) The value of the lease, including any rights therein, if any, which accrues to the lessee;

first two sentences of Haw.Rev.Stat. 516-1(14) are not objectionable.[25] Thereafter, the definition attempts to qualify "fair market value" and "just compensation" by setting forth two and only two methods by which just compensation "shall" be determined, and by mandating that method which "gives the greater consideration to the lessee's interest."[26] Without going

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(ii) That percentage of the general enhancement of the neighborhood which has been paid for or contributed directly or indirectly by the lessee;

(iii) The current replacement cost of that portion of existing offsite improvements, including overhead and profit at prevailing rates, which were paid for or otherwise contributed directly or indirectly by the lessee;

(iv) That percentage of the general enhancement of the development tract and the lot caused by the onsite improvements on the lot paid for, or contributed, directly or indirectly, by the lessee;

(v) That amount, not otherwise deducted herein, allocated to the lot, which was paid for or otherwise contributed, directly or indirectly by the original lessee, computed at prevailing rates for overhead and profit in developing the development tract established by existing practice in the community; and

(vi) That amount for fees and costs which would ordinarily be borne by lessor in transferring such interest to lessee, including, but not limited to, attorneys' or realtors' commissions, other costs of sale, and similar fee;

provided, however, that the values established by any one of the foregoing shall not be duplicated in any one of the other provisions.

25 These two sentences equate fair market value of the leased fee interest with just compensation to the lessor. This accords with accepted Constitutional requirements. *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 573, 575, 18 S.Ct. 445, 42 L.Ed. 853 (1898); *United States v. Miller*, 317 U.S. 369, 373-74, 63 S.Ct. 276, 87 L.Ed. 336 (1943).

26 Intervenors argue that the controlling phrase is "just compensation" and the rest of the definition must be read in that light. Thus if method "(A)" results in "just compensation" and method "(B)" does not, but method "(B)" gives "the greater consideration to the lessee's interest,"

into the details of Method A[27] and Method B,[28] it is clear to me that the definition can pass constitutional scrutiny under the Fourteenth Amendment only if everything after the first two sentences in this definition of "owner's basis" is ignored. That, in essence, is what I understand defendants and intervenors to argue that I should do.[29]

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method "(B)" is not to be used. Actually, the definition is logically incomplete as it does not provide for the circumstance wherein "just compensation" and "the greater consideration to the lessee's interest" do not both result from applying the same method. Beyond that, the definition is semantically inconsistent in that the use of a method that gives the lessee's interest greater consideration implies that that method gives the lessor's interest lesser consideration, which leaves the meaning of "just compensation" understandable only in terms of a dialect of newspeak.

27 Haw.Rev.Stat. § 516-1(14)(A) (1976), *supra* note 24. The method described is agreed by all testifying experts to be one acceptable method of determining fair market value of a leased fee interest, except that the discount rate should be determined by market conditions and not fixed by statute. The testimony was to the effect that application of the statutory formula resulted in a discount rate the same as or somewhat more favorable to the lessor than the discount rate in the market. While the method appears to be straight forward and definite, intervenors' experts testified that there were some six judgment calls that had to be made by an appraiser in using this method.

28 Haw.Rev.Stat. § 516-1(14)(B) (1976), *supra* note 24. Again all experts agreed that the *general* approach is one acceptable method of determining the fair market value of a leased fee interest. Plaintiffs' experts testified, however, that if followed literally, the method as defined could not result in "just compensation." Intervenors' experts testified that the method was presently rather useless because of the paucity of market data, and that the itemization of what to deduct was considered to be more of a checklist than a required list of items to be valued. Intervenors' appraisers considered items (ii), (iii), (iv), and (v) to be included under item (i), and all experts had difficulty accommodating item (vi).

29 One difficulty with the detailed and restrictive approach of § 516-1(14) is that it purports to exclude any method other than method "(A)" and method "(B)" as therein defined. But intervenors' experts testified that they did not consider themselves to be so restricted by the statutory language. Neither expert, in applying the statute, actually compared the results ob-

Third, I am of the opinion that the mandatory arbitration provisions of Part IIA[30] are unconstitutional on their face.[31] The statute provides that mandatory arbitration shall be in advance of and not any part of any action in eminent domain,[32] that mandatory arbitration shall be conducted and carried into effect before a condemnation action has been commenced,[33] and that the purpose of the mandatory arbitration is "to establish [the] amount of just compensation which will be paid to lessor for the lessor's leased fee interest" in the event of condemnation.[34] All defendants agree that the lessor

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tained by applying method "(A)" with the results obtained by applying method "(B)" to determine which method gave "the greater consideration to the lessee's interest," and both, in applying method "(A)" built in an inflation factor which offset the mandatory discount rate. In effect, they decided what in their opinion present fair market value of the leased fee interest in a lot amounted to, and then adjusted the several judgment calls involved to justify this opinion.

30 Haw.Rev.Stat. ch. 516 Part IIA (1976).

31 It is assumed, for purposes of this hearing, that we are only considering the application of these provisions to leases executed prior to June 15, 1976, the date this part took effect.

32 Haw.Rev.Stat. § 516-51(b) provides:

> This mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

33 Haw.Rev.Stat. § 516-53 (1976) provides:

> Timing of mandatory arbitration. Mandatory arbitration under this part shall be conducted and carried into effect before a condemnation action has been commenced.

34 Haw.Rev.Stat. § 516-51(a) (1976) provides:

> Mandatory arbitration of compensation authorized. (a) Upon the filing of a petition by the number of lessees required by section 516-22 with the Hawaii housing authority, the authority shall request the lessor and the lessees or their designated agents to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development tract. If negotiations fail then the Hawaii housing authority shall direct the

eventually is accorded a right to a jury trial on the issue of just compensation,[35] that just compensation is equivalent to fair market value,[36] and that fair market value is to be determined by the jury based on all relevant evidence.[37]

The statute provides that the "effect of the arbitration award and all matters relating thereto shall be prima facie evidence as to just compensation in any condemnation proceeding under this chapter."[38] But the mandatory arbitration is to proceed pursuant to Haw.Rev.Stat. Chap. 658,[39] which provides for proceedings in a circuit court confirming, vacating, modifying, or correcting an award, and a further appeal to the State supreme court.[40] By the time these procedures have been

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lessor and lessee to submit to mandatory arbitration under chapter 658 to establish an amount of just compensation which will be paid to lessor for the lessor's leased fee interest under section 516-24.

35 Haw.Rev.Stat. § 516-23 (1976) provides in part that "the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101." Haw.Rev.Stat. ch. 101 (1976) contains Hawaii's general statutory provisions relating to eminent domain. § 101-11 provides that "the procedure shall be the same as in other civil actions." This includes the right to a jury trial on the issue of compensation or damages. *See State v. Chang*, 50 Haw. 195, 436 P.2d 3 (1967).

This is not to say that a State may not employ other procedures for determining just compensation. *See Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 41 L.Ed. 979 (1897); 12 Wright And Miller, Federal Practice And Procedure § 3055 (1973). Here, mandatory arbitration is specifically stated *not* to be any part of any action in eminent domain. *See* notes 32 and 33, *supra*.

36 *See* cases cited in note 25 *supra*.

37 *See United States v. Miller*, 317 U.S. 369, 373-75, 63 S.Ct. 276, 87 L.Ed. 336 (1943).

38 Haw.Rev.Stat. § 516-55 (1976).

39 Haw.Rev.Stat. § 516-51(a) and § 516-54(a)(6) (1976).

40 Haw.Rev.Stat. § 516-54(a)(6) (appeal to circuit court), § 658-8 (award; confirming award), § 658-9 (vacating award), § 658-10 (modifying or correcting award), § 658-15 (appeal when) (1976).

completed, considerable time will have elapsed.[41] Yet the date of valuation in condemnation is the date of designation by the Hawaii Housing Authority,[42] which has no necessary relationship to the date as of which "just compensation" is determined pursuant to the mandatory arbitration, and would be expected to come after the final completion of the mandatory arbitration proceedings and a further refusal by the lessor to convey.[43]

And then when the final judgment has been entered determining the arbitration award, the lessee does not have to purchase the lessor's leased fee interest,[44] and the Hawaii Housing Authority does not have to commence condemnation proceedings.[45] Nevertheless, and even if there is a purchase or a

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41 "The Supreme Court of Hawaii is falling alarmingly behind in disposing of its expanding caseload. The current backlog is sufficient, given existing disposition rates, to occupy the Court for three years." Levinson, *Appellate Caseload in Hawaii,* 13 HAW.BAR J. (No. 3) 3 (1977).

42 Haw.Rev.Stat. § 516-24 provides that the compensation to be paid for the lessor's leased fee interest "shall be determined as of the date of the designation of the applicable portion of the development tract for acquisition."

43 The mandatory arbitration provisions of the chapter do not specify the date as of which "just compensation" shall be determined. Presumably the arbitrators will specify the date they have used in reaching their award. § 516-51(a) does provide that the purpose of the mandatory arbitration is "to establish an amount of just compensation which will be paid to lessor for the lessor's leased fee interest" under § 516-24. But for the latter purpose, by § 516-24, just compensation is to be determined as of the date of designation, which by § 516-53 is supposed to come after the completion of arbitration. Since the arbitrators can hardly be expected to guess when the Hawaii Housing Authority will designate a development tract for acquisition, the date of valuation for purposes of mandatory arbitration and the date of valuation for purposes of condemnation will necessarily be different, by possibly several years.

44 The only effect of the arbitration award is that it "shall be prima facie evidence as to just compensation in any condemnation proceeding under this chapter." Haw.Rev.Stat. § 516-55 (1976).

45 Haw.Rev.Stat. § 516-51(b) (1976).

condemnation, the lessor must pay one-half of all expenses and fees of arbitration proceedings incurred by the arbitrators,[46] without reimbursement.[47] This in itself may be a taking of property without just compensation.[48]

Having reached the conclusions set forth above, I must still decide whether a preliminary injunction should issue and if so what should be enjoined. The statute in question contains a very comprehensive severability clause.[49] Thus, unless the statute must stand or fall as a whole, specific provisions that may be invalid may be separated out, leaving the other provisions in force.

I am of the opinion that those portions of the definition of the "owner's basis" to which the Trustees object are severable. I frankly do not believe that striking everything after the first two sentences in Haw.Rev.Stat. 516-1(14) would have any effect whatsoever on the operation of the statute or on the

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46 Haw.Rev.Stat. § 516-54(a)(5) (1976) provides:

> All expenses and fees of arbitration proceedings incurred by arbitrators shall be paid one-half by lessors and one-half by lessees.

47 Haw.Rev.Stat. § 516-23 (1976) provides in part that, after a designation pursuant to § 516-22:

> If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings are not instituted within the twelve-month period [after designation], the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation.

There is no similar provision with respect to the expenses incurred as a result of the mandatory arbitration proceedings of Part IIA.

48 *See* 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3056 (1973); *Supplementary Report of the Advisory Committee on Rule Governing Condemnation Cases*, 11 F.R.D. 222, 243 (1951).

49 Haw.Rev.Stat. § 516-82 (1976). Although the statutory provision came from 1975 Haw.Sess.Laws Act 184 § 2, similar severability provisions were contained in 1967 Haw.Sess.Laws Act 307 § 44, and 1976 Haw.Sess.Laws Act 242 § 6.

manner in which appraisers value the lessor's leased fee interest.[50] In any event, there is no pending matter involving these objected-to provisions that requires a preliminary injunction.

I am of the opinion that the mandatory arbitration provisions of the statute likewise are severable. In fact, the statute as originally passed did not contain this part, which was added in 1976.[51] Unlike the objectionable features of the "owner's basis" definition, however, the Trustees are presently faced with a demand by the Hawaii Housing Authority to enter into mandatory arbitration pursuant to the statute.[52] As I have indicated that in my opinion the Trustees will probably succeed on the merits of this issue, I must determine whether there is possible irreparable injury to the Bishop Estate or a balance of hardships tipping decidedly toward the Trustees so as to make just and proper the issuance of a preliminary injunction en-

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50 *See* discussion in notes 26, 27, 28, and 29, *supra*. None of this language was in the original Hawaii Land Reform Act. *See* legislative history set out in note 13, *supra*.

51 *See* discussion in note 15, *supra*.

52 Letter dated January 22, 1979, from the Acting Executive Director of the Hawaii Housing Authority to the Trustees of the Bishop Estate informing the Trustees that the Commission of the Authority on January 18, 1979, had by a unanimous vote decided to invoke mandatory arbitration in connection with the leasehold to fee simple conversion of lots in Tract H as requested by the Wai-Kahala Tract H Association, Inc., and pursuant to the Authority's Rule 10, Section 10. The latter concluded with the directive that "the parties are ordered to begin mandatory arbitration upon receipt of this notice."

An earlier letter dated August 21, 1978, from the Land Reform Administrator to the Trustees notified the Trustees that Tract H petitioners had "asked to proceed to arbitration" and stated that "it is appropriate that the arbitration period required by that section [1976 Haw.Sess.Laws Act 242 § 4] commence." This letter advised the Trustees that "you have 30 days from the date of receipt of this letter to name an arbitrator; the petitioners are also naming an arbitrator." The Trustees refused to name an arbitrator. Among other grounds, they did not consider this letter as having been properly authorized.

joining the implementation of Part IIA of Chapter 516 of the Hawaii Revised Statutes.

A preliminary injunction limited to mandatory arbitration affects only one pending group of lessees of 102 lots.[53] It is not likely that many other lessees would be similarly affected for several months. Even those prevented by a preliminary injunction from starting the mandatory arbitration procedures may seek a designation pursuant to Haw.Rev.Stat. § 516-22 which would have the effect of fixing the date of valuation.[54]

On the other hand, the Trustees would be forced into a proceeding which could set a precedent affecting several thousand lots[55] and which could make them liable for an indeterminate amount in unrecoverable costs.[56]

As I balance the relative interests of the parties and of the public, I am of the opinion that the *Aguirre* test for the issuance of a preliminary injunction has been met.

The preliminary injunction shall be in the same form as the Temporary Restraining Order as modified on March 27,

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53 The only group of Bishop Estate lessees who have progressed to the point where the Hawaii Housing Authority may direct the lessor and lessees to submit to mandatory arbitration are those in so-called Tract H represented by WAI-KAHALA TRACT H ASSOCIATION, INC. Tract H comprises 102 lots.

54 Haw.Rev.Stat. § 516-22 and § 516-24 (1976). While Part IIA provides that mandatory arbitration shall precede condemnation, there is no requirement that mandatory arbitration shall precede designation.

55 While Tract H of 102 lots is the only Bishop Estate development tract which is presently at the stage when mandatory arbitration may be ordered, several other Bishop Estate tracts involving about 7,000 lots are going through the procedures established by the Hawaii Land Reform Act for leasehold to fee simple conversion.

56 From 1918 through March 1977, the Bishop Estate executed some 20,735 residential leases in development tracts. At present there are in force some 13,500 such leaseholds involving approximately 3,500 acres of land. 6,280 leases of lots in residential development tracts were executed from 1967 to 1977, inclusive.

1979,[57] with the further proviso that steps outside of Part IIA, specifically designation and commencement of condemnation proceedings, are not enjoined under this preliminary injunction.[58]

Intervenors suggest security in the amount of $1,000,000 to cover possible damages to lessees for a wrongful injunction. The Trustees suggested and posted security in the amount of $100 on the temporary restraining order. In my opinion, each lessee is adequately secured against inflationary or real increases in value by the lessor's leasehold fee interests in the lot leased by the lessee. This is not to imply that the lessees might have any claim. The injunction actually runs only against the Hawaii Housing Authority. I do believe, however, that a more substantial sum than $100 is called for, notwithstanding the financial resources of the Bishop Estate. Under the circumstances I believe security in the sum of $10,000 would be proper.

Counsel for the respective parties and intervenors shall attempt to agree upon a form of preliminary injunction for submission to the court on or about May 15, 1979, or in default of agreement, shall submit their respective suggestions on the same date.

The foregoing constitute the court's findings and reasons required by Rule 65(d) of the Federal Rules of Civil Procedure.

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57 Restraining only steps under Part IIA following a letter from the Hawaii Housing Authority directing the lessor and the lessee(s) to submit to mandatory arbitration.

58 Plaintiffs cannot be seriously damaged in the next several months as actual condemnation is not that imminent. In this area, a balancing of the interests of the parties and of the public leads me to the conclusion that a preliminary injunction should not issue, even if plaintiffs might ultimately prevail on their claim that the State's power of eminent domain may not be used to accomplish the purposes of the Hawaii Land Reform Act.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

--v.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Appellees.

JUDGMENT

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed and remanded.

Filed and entered March 28, 1983.

[Dated June 27, 1983]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

[Filed June 17, 1983]

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—v.—

PAUL A. TOM, et al.,

Defendants-Appellees.

ORDER

Before: ALARCON, FERGUSON, and POOLE, *Circuit Judges.*

A majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for the appropriateness of rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and a majority of the judges of the court in regular active service have noted not to grant rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Joint Motion to withdraw the Petition for Rehearing and Suggestion for Rehearing En Banc is dismissed as moot.

The several Notices of Withdrawal of the above Joint Motion are dismissed as moot.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

[Filed July 15, 1983]

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—v.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenors-Appellees.

NOTICE OF APPEAL

The State of Hawaii and the Hawaii Housing Authority and Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoski Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority, Franklin Y. K. Sunn, Executive Director of the Hawaii Housing Authority, Defendants-Appellees in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), hereby appeal from the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case dated

March 28, 1983, under 28 U.S.C. § 1254(2). Rehearing and rehearing en banc were denied in this case on June 17, 1983.

DATED: Honolulu, Hawaii, July 14, 1983.

/s/ TANY S. HONG
Attorney General

LAURENCE H. TRIBE
Special Deputy Attorney General

MICHAEL A. LILLY
First Deputy Attorney General

Attorneys for Defendants-Appellees

APPENDIX G

HAWAII REVISED STATUTES

CHAPTER 516*

RESIDENTIAL LEASEHOLDS

PART I. GENERAL PROVISIONS

SECTION

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516-30 Purchase of Leased Fee Interest

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* Reprinted here, in its entirety, is the version of Hawaii Revised Statutes, Chapter 516, as amended through the 1980 session of the Hawaii State Legislature, that was before the United States Court of Appeals for the Ninth Circuit on the appeal below. Additions or amendments to this statute that have since been enacted are not relevant to the appeal before this Court.

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[PART IIA.] MANDATORY ARBITRATION OF COMPENSATION [REPEALED]

[516-51] Mandatory Arbitration of Compensation Authorized
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516-65 Extension
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PART IV. JUDICIAL DECLARATION

516-81 Repealed
[516-82] Severability
[516-83] Legislative Findings and Declaration of Necessity; Purpose

PART I. GENERAL PROVISIONS

§ 516-1 Definitions. Unless otherwise clear from the context, as used in this chapter:

(1) "Authority" means the Hawaii housing authority created by chapter 356.

(2) "Development tract" means a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots. Two or more pieces of real property shall be considered as a single contiguous area if they would be contiguous except for the interposition or existence of a road, street, stream, fee lot, or other like interference.

(3) "Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy an interest in land would pay an owner willing, but not obliged, to sell it, taking into consideration all uses to which the land is adapted or might in reason be applied.

(4) "Fee simple owner" and "fee owner" mean the person who owns the fee simple title to the land which is leased, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and his heirs, successors, legal representatives, and assigns.

(5) "Lease" means a conveyance of land or an interest in land, by a fee simple owner as lessor, or by a lessee or sublessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term, measured from the initial date of the conveyance, twenty years or more (including any periods for which the lease may be extended or renewed at the option of the lessee).

(6) "Leased fee" and "leased fee interest" mean all of the interests of the fee owner, lessor, and all legal and equitable owners of the land which is leased, other than the lessee's interests as defined by this chapter.

(7) "Legal and equitable owners" means the fee simple owner and all persons having legal or equitable interests in the fee or in the lessor's leasehold estate, including mortgages, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

(8) "Lessee" means any person to whom land is leased or subleased, and his heirs, successors, legal representatives, and assigns.

(9) "Lessor" means any person who leases or subleases land to another, and his heirs, successors, legal representatives, and assigns.

(10) The terms "lessor", "lessee", "fee simple owner", "fee owner", and "legal and equitable owners" include individuals, both masculine and feminine, and, except as to the term "lessee", the terms also include corporations, firms, associations, trusts, estates, and the State or its political subdivisions. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

(11) "Lot", "houselot", "residential lot", and "residential houselot" mean a parcel of land, two acres or less in size, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for one or two families.

(12) "Offsite Improvements" means all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes and underground electric cables, constructed or placed in a subdivision off the lots intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by the occupants

of all lots [for] whose benefit the improvements have been constructed or placed.

(13) "Onsite improvements" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefits of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

(14) "Owner's basis" means the value of the lessor's leased fee interest in the lot that would apply if such interests were normally traded on an open market. The fair market value of the owner's basis shall be established to provide the lessor with just compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value. The value may be determined by either of the following methods, or any other method which is normally used by qualified appraisers in establishing the fair market value of a lessor's leased fee interest in land:

(A) The sum of: (i) the future rental income stream for the lot for the term of the lease discounted to present worth from the expiration date of the lease; and (ii) the value of the lessor's reversionary interest in the lot discounted to present worth from the expiration date of the lease. The discount rate shall be based on the maximum rate of return for insured passbook demand saving account paid by the savings and loan institutions in Hawaii plus three and three-fourths per cent; provided, however, that the discount rate may be modified by mutual agreement of the lessor, lessee, and the authority; or

(B) The current fair market value of the lot, valued as if it were a fee simple lot and as if the fee title were unencumbered, and excluding onsite im-

provements, established by a market data approach utilizing comparable sales, less the following:

(i) The value of the lease, including any rights therein, if any, which accrues to the lessee;

(ii) That percentage of the general enhancement of the neighborhood which has been paid for or contributed directly or indirectly by the lessee;

(iii) The current replacement cost of that portion of existing offsite improvements, including overhead and profit at prevailing rates, which were paid for or otherwise contributed directly or indirectly by the lessee;

(iv) That percentage of the general enhancement of the development tract and the lot caused by the onsite improvements on the lot paid for, or contributed, directly or indirectly, by the lessee;

(v) That amount, not otherwise deducted herein, allocated to the lot, which was paid for or otherwise contributed, directly or indirectly by the original lessee, computed at prevailing rates for overhead and profit in developing the development tract established by existing practice in the community; and

(vi) That amount for fees and costs which would ordinarily be borne by lessor in transferring such interest to lessee, including, but not limited to, attorneys' or realtors' commissions, other costs of sale, and similar fee;

provided, however, that the values established by any one of the foregoing shall not be duplicated in any one of the other provisions. [L 1967, c 307, § 2; HRS § 516-1; am L 1968, c 46, § 2a to d; am L 1975, c 184, § 2(1); am L 1976, c 242, § 1]

[am L 1978, c 140, § 1; am L 1979, c 227, § 1; am L 1980, c 39, § 2 and c 107, § 2]

§ 516-2 Applicability. This chapter applies to all lands leased as residential lots which are owned or held privately or owned by the State or its political subdivisions, except Hawaiian home lands which are subject to Article XI of the Constitution of the State and lands owned or held by the federal government. This chapter is not meant to supersede or preclude any other remedy at law available to residential leasehold lessees or the State, including those available under chapter 480. [L 1967, c 307, § 3; HRS § 516-2; am L 1969, c 203, § 1; am L 1975, c 184, § 2(2)]

§ 516-3 No estoppel or waiver. The rights granted to lessees by this chapter shall be effective, notwithstanding any provision in any lease or contract to the contrary. No lessee shall be estopped by an covenant, term, condition, or contract, however worded, from claiming the rights granted to him or otherwise be deemed to have waived such right. Any provision in any lease or contract contrary to the intent or purpose of this chapter is void. [L 1967, c 307, § 4]

§ 516-4 Trusts and estates. The rights granted to lessees by this chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether such tenancy, fee, estate or trust was in effect prior to June 24, 1967 or is created hereafter, and the life tenant, holder, officer, or trustee of any such tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding twenty years and shall perform all acts required of him by this chapter. Every such instrument now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner shall, while acting pursuant to this chapter, be deemed to be acting in bad faith or to have committed a breach of trust. [L 1967, c 307, § 5; HRS § 516-4; am L 1975, c 184, § 2(3)]

§ 516-5 Penalty. Any person who violates this chapter shall be fined not more than $5,000 nor less than $1,000 or

imprisoned not more than one year, or both. All fines collected shall be deposited in the fee simple revolving fund created by this chapter. [L 1967, c 307, § 6]

§ 516-6 Administration of chapter. The Hawaii housing authority shall administer this chapter. [L 1967, c 307, § 7]

§ 516-7 Authority's duties, generally. In addition to any other duty prescribed by law and in this chapter, the Hawaii housing authority shall:

(1) Within six months after June 24, 1967, adopt and promulgate, in accordance with chapter 91, all rules and regulations necessary to effectuate the purposes of this chapter;

(2) Enforce this chapter and the rules and regulations adopted pursuant thereto;

(3) Subject to chapters 76 and 77, appoint and remove such adminstrative, technical, and clerical staff as it may require and prescribe their powers and duties; except that the authority may appoint, without regard to chapters 76 and 77, one or more appraisers on a part-time, contractual basis for the purposes set forth in this chapter;

(4) Establish such reasonable fees to be assessed and collected from lessees for the services of any appraiser;

(5) Disseminate information and render assistance to lessees of residential lots in order that this chapter may be understood and effectively implemented;

(6) Conduct an investigation upon any written complaint or whenever it appears to the authority that this chapter has been or is being violated. In such investigation, the authority may examine the books, accounts, records, and files of any person connected with the matter under investigation and conduct hearings. If the authority finds from satisfactory evidence that any person has violated or is violating this chapter, it may order such person to cease and desist from continuing the violation or engaging therein or doing any act or acts in furtherance thereof and, where necessary, it may bring an action in the

name of the State in any court of competent jurisdiction for enforcement of its orders;

(7) Acquire by eminent domain proceedings, all necessary property interests as provided in this chapter;

(8) Make and execute contracts, mortgages, and other instruments necessary or convenient to the exercise of the powers of the authority;

(9) From t me to time, require from the lessors of leases of residential lots and from all fee owners and legal and equitable owners of lots subject to such leases, such information as it may reasonably require in connection with the adminstration of this chapter;

(10) Do all things necessary and convenient to carry out the powers expressly conferred upon it by this chapter. [L 1967, c 307, § 8; HRS § 516-7; am L 1975, c 184, § 2(4)]

§ 516-8 Interested members, officers, or employees No member of the Hawaii housing authority or officer or employee administering this chapter shall acquire any interest, direct or indirect, in the ownership or development of any development tract other than by gift, devise, or inheritance, nor shall he have or acquire any interest, direct or indirect, in the financing or in any contract or proposed contract for services to be furnished or used in connection with or relating to the development of any development tract. If any such member, officer, or employee has or acquires an interest by gift, devise, or inheritance, direct or indirect, in any development tract or is a lessee of any residential lot affected by the eminent domain proceedings instituted under this chapter, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. The member, officer, or employee shall not participate in any action by the authority relating to the property, tract, or contract in which he has or acquires any such interest. Violation of this section constitutes misconduct in office and is cause for dismissal [L 1967, c 307, § 9]

PART II. CONDEMNATION OF DEVELOPMENT TRACT

§ 516-21 Applicability. This part applies to development tracts which are, at the time of acquisition of leased fee interests in residential lots within such tracts by the Hawaii housing authority as [provided] herein:

(1) Developed and subdivided into residential houselots occupied by lessees under leases executed before June 24, 1967;

(2) Developed and subdivided or partially developed into residential houselots occupied or to be occupied by lessees under leases executed after June 24, 1967, provided that ten or more years remain before the final termination of the lease term, and provided further that ninety per cent of the leases to the lots have been executed. [L 1967, c 307, § 10; HRS § 516-21; am L 1975, c 184, § 2(5)]

§ 516-22 Designation of leased fee interest in all or part of development tract for acquisition. The authority may designate all or a portion of a development tract for acquisition and acquire leased fee interests in residential houselots in such development tract, through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after twenty-five or more lessees or the lessees of more than fifty per cent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority to purchase the leased fee interest in their residential leasehold lots pursuant to section 516-33 and if, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the county in which the development tract is situated on at least three different days, the last publication being not less than five days before the date of hearing, the authority finds that the acquisition of the leased fee interest in residential houselots in all or part of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in

this part will effectuate the public purposes of this chapter. [L 1967, c 307, § 11; HRS § 516-22; am L 1975, c 184, § 2(6); am L 1976, c 242, § 2]

§ 516-23 Exercise of power of eminent domain. Within twelve months after the designation of all or part of the development tract for acquisition, the Hawaii housing authority shall acquire through voluntary action of the parties, or institute eminent domain proceedings to acquire the leased fee interest in the tract or portion so designated; provided that negotiations for acquisition by voluntary transaction shall not be required before the institution of eminent domain proceedings. Except as otherwise provided in this part, the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101. If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings are not instituted within the twelve-month period, the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation. [L 1967, c 307, § 12; HRS § 516-23; am L 1975, c 184, § 2(7)]

§ 516-24 Compensation. The compensation to be paid for the leased fee interest in a residential houselot within a tract shall be the owner's basis as defined in section 516-1(14). The compensation shall be determined as of the date of the designation of the applicable portion of the development tract for acquisition. [L 1967, c 307, § 13; HRS § 516-24; am L 1968, c 46, § 2e; am L 1975, c 184, § 2(8)]

[§ 516-24.5] Exchanges. (a) The authority may exchange public lands for private lands to be condemned or involuntarily sold pursuant to this chapter; provided that any such exchange shall be subject to legislative disapproval; provided further that lands exchanged need not be of like-kind or comparable use; and provided further that no lands classified as conservation shall be exchanged for private lands.

(b) The authority may acquire private lands by negotiated sale for purposes of exchanging such land with private lands pursuant to subsection (a). The legislature declares that such acquisition is for the public purpose of encouraging home ownership on as widespread a basis as possible. [L 1975, c 184, § 2(21)]

§ 516-25 Interest acquired. (a) Upon acquisition of the leased fee interest in residential houselots within all or a portion of a development tract as provided in this part, the property interest acquired by the Hawaii housing authority is all of the right, title, and interest of the fee owner, and of the lessor and all legal and equitable owners, if any, in and to the residential houselots acquired; subject to existing leases of residential houselots within the development tract, and to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential houselot leases, which are not inconsistent with the intent of this part. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether the interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the leasehold is subject to any mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee shall in no manner affect or impair the mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to extent necessary to avoid any impairment of such leasehold security, unless the holder of the leasehold mortgage, lien, or encumbrance shall in writing consent to the transfer thereof to the fee as herein provided. Upon the written consent by the holder thereof, each such mortgage, lien, or encumbrance to which

the leasehold is subject and to which such consent refers shall be transferred to and shall bind the fee acquired by the lessee, and shall thereafter continue in full force and effect as a mortage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest. [L 1967, c 307, § 14; HRS § 516-25; am L 1975, c 184, § 2(9)]

§ 516-26 Interest in compensation paid by the authority. The fee owner, lessor, and all legal and equitable owners shall share in the compensation paid by the Hawaii housing authority as their respective interests appear. Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in such compensation paid by the authority to the extent of his interest as may be determined by agreement of those entitled to share in the compensation paid by the authority, or in the absence of such agreement, pursuant to chapter 658. [L 1967, c 307, § 15; HRS § 516-26; am L 1975, c 184, § 2(10)]

§ 516-27 Compulsory or involuntary conversion. It is the intent of the legislature, within the meaning of section 1033 or section 1231 of the Internal Revenue Code or the applicable provisions of chapter 235, Hawaii Revised Statutes, as well as all other statutes, rules, regulations, administrative orders, and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the authority under this part shall constitute a compulsory or involuntary conversion (as a result of the exercise of the power of condemnation or the threat of imminence thereof), and that such fee owner shall not be deemed, by reason, in whole or in part, of any provision of this part or by reason of the execution by the fee owner of leases to the property and other properties subsequent to June 24, 1967, to hold the property primarily for sale to customers in the ordinary course of trade or business. [L 1967, c 307, § 16]

§ 516-28 Disposition, generally. It shall be the policy of the Hawaii housing authority to encourage the widespread fee simple ownership of residential lots situated within a development tract. Where necessary or desirable, the authority may lease the residential lots. Not more than one lot shall be sold in fee simple or leased to a purchaser or lessee. A husband and his wife together, unless separated and living apart under a decree of separation issued by a court of competent jurisdiction, shall be entitled to only one lot. [L 1967, c 307, § 17; HRS § 516-28; am L 1975, c 184, § 2(11)]

§ 516-29 Notice of disposition. Except in case of a sale of the leased fee interest to the lessee of a residential lot under lease, no sale or lease of any residential lots shall be made by the Hawaii housing authority unless it has published on at least two different days in a newspaper of general circulation in the county, a notice of its intent to sell or lease. The notice shall state, in general terms, the size, location, and prices or lease rentals of the lots to be sold or leased, the terms of the sale or lease, and the last date on which applications will be received by the authority, which date shall not be less than thirty days after the first publication of the notice. The notice shall also state the times and places at which more detailed information with respect to the sale or lease may be secured by interested persons. [L 1967, c 307, § 18; HRS § 516-29; am L 1968, c 46, § 2f]

§ 516-30 Purchase of leased fee interest. The lessee of a residential lot within a development tract, whether he was a lessee at the time of the acquisition or became a lessee after the acquisition of the development tract, who has applied to the authority and has qualified for purchase of the leased fee interest shall purchase from the Hawaii housing authority by contract within sixty days of acquisition of the interest by the authority, the leased fee interest to the lot, subject to the terms, covenants, and conditions of the contract executed with the authority; provided that the lessee is not then in default in the performance of his obligations under the lease; and further provided that should any of said lessees fail or refuse to enter

into such a contract, then in such event, each such lessee shall pay to the authority his pro-rata share of all costs incurred by the authority in the acquisition of the houselots within the development tract including but not limited to appraisal costs, costs of publication, and survey, and the authority is hereby authorized to take whatever action it deems necessary to collect such costs; and provided further that in case of a wilful breach of the purchase agreement the authority shall be entitled to any available remedy, including the sale of its interest in the houselot; and further provided that the sales price shall be at the lowest possible price consistent with section 516-32 and the purpose of this chapter. [L 1967, c 307, § 19; HRS § 516-30; am L 1975, c 184, § 2(12)]

§ 516-31 Disposition by lease. The Hawaii housing authority may lease any of the residential lots in a development tract at such lease rentals and upon such terms and conditions as it may determine. The leases shall be subject to all of the rights of lessees enumerated in part III of this chapter. The authority may, in its discretion, utilize any of the residential lots and rent out the same for periods of twenty years or less for the purposes set forth in chapters 356 to 360, or for any other purpose, all upon such terms and conditions as the authority may determine. [L 1967, c 307, § 20]

§ 516-32 Not for profit. It is declared to be the policy of the State that the Hawaii housing authority shall carry out its responsibilities under this part in an efficient manner so as to enable it to fix the sales prices and rentals for residential lots at the lowest possible rates consistent with the purpose of this part; and that the authority shall not administer this part for profit, or as a source of revenue to the State. To this end, the authority shall fix the sales prices for residential lots or rentals for lots at no higher rates or prices than it shall find to be necessary in order to produce revenues which (together with all other available moneys, revenues, income, and receipts of the authority from whatever sources derived under the administration of this part) will be sufficient: (1) to pay, as the same becomes due, the principal and interest on the bonds of the

authority; (2) to meet the cost of, and to provide for the administration of this part; and (3) to create a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve. [L 1967, c 307, § 21]

§ 516-33 Qualification for purchase. Except as otherwise provided under section 516-28, no sale of any residential houselot within a development tract shall be made to any person unless he meets the following requirements:

(1) Is at least eighteen years of age;

(2) Is a bona fide resident of the State or has a bona fide intent to reside in the development tract if successful in purchasing the lot;

(3) Has legal title to, or pursuant to an agreement of sale an equitable interest in, a residential structure situated on the leased lot applied for; provided that, for the purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase the lot. An agreement of sale means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Has a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that he will be able to promptly pay the authority for the leased fee interest in the lot;

(5) Submits an application in good faith in such form as is acceptable to the authority;

(6) Executes a contract for purchase of the fee interest in such form as is acceptable to the authority; and

(7) Does not own in fee simple lands suitable for residential purposes within the county and in or reasonably near the place of business of such person or has or have pending before the Hawaii housing authority an unrefused application to lease or purchase a lot in a development tract. A person is deemed to own lands herein if he, his spouse, or both he and his spouse (unless

separated and living apart under a decree of a court of competent jurisdiction) own lands.

In the event of a wilful breach of contract of a lessee to purchase the leased fee interest, the authority may sell or assign its interest without respect to the requirements of this section.

The authority may require additional testimony or evidence under oath in connection with any application. The determination by the authority of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such. The authority shall adopt rules and regulations pursuant to chapter 91 to effectuate the purposes of this section. [L 1967, c 307, § 22; HRS § 516-33; am L 1972, c 2, § 30; am L 1975, c 184, § 2(13)] [am L 1978, c 140, § 2; am L 1980, c 39, § 3]

[§ 516-33.5] Deposits by lessees. (a) The authority may require the submission of a deposit by any lessee applying to the authority for the purchase of a residential lot under this chapter. The amount of the deposit, not to exceed $500 shall be established by rule.

(b) No deposit shall be required to be made more than one hundred eighty days prior to the date estimated by the authority for condemnation of the development tract.

The deposit may be applied by the authority, after the acquisition of all or part of the development tract or the institution of eminent domain proceedings, to payment of appraisal, survey, and attorney fees the authority has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. [L 1978, c 140, § 3]

§ 516-34 Mortgages, agreements of sale, other instruments. (a) If an applicant who wishes to purchase the leased fee interest in his residential leasehold lot is unable to obtain sufficient funds at reasonable rates from private lenders, the

Hawaii housing authority may, by way of mortgage, agreement of sale or other instruments to secure the indebtedness, loan to the purchaser up to ninety per cent of the purchase price; provided that such agreement of sale shall be for a term not to exceed three years; provided further that the authority, upon its discretion, may extend such agreement of sale for not more than two years if the lessee requests such extension. In case of any dispute of the extension of the agreement of sale, the lessee shall bear the burden of proof to show good cause for such extension.

(b) The purchaser of the leased fee interest shall pay not less than ten per cent of the price and execute with the authority an agreement of sale, or mortgage, or other instrument to secure the indebtedness under the terms of which the unpaid balance and the interest thereon, at a reasonable rate determined by the authority, shall be paid in monthly installments over such periods as the authority may determine. Every mortgage, agreement of sale, other instruments to secure the indebtedness, or instrument of indebtedness shall be freely assignable by the authority and may contain such other provisions as are usually found in such instruments and shall provide that the purchaser may prepay the whole or any part of the unpaid balance of the purchase price plus accrued interest at any time without prepayment penalty.

(c) If the purchaser defaults on the payment of any loan, the authority shall take all necessary action to collect the delinquent principal and interest on the loan and may take all actions allowed to holders of obligations, including the power to repossess, purchase, lease, rent, repair, renovate, modernize, and sell the property foreclosed. [L 1967, c 307, § 23; HRS § 516-34; am L 1968, c 46, § 2g; am L 1975, c 184, § 2(14)]

§ 516-35 Restrictions on sale and use of residential lots. (a) If state moneys are used for the purchase of the owner's basis, then for a period of ten years after the purchase from the authority of the leased fee interest in a residential lot, the purchaser shall not transfer any interest in the property unless he has first notified the authority in writing of his intention to do so.

The notice shall specify the purchaser's address and upon receipt of the notice, the authority shall have the first option to purchase the land at the original purchase price of the leased fee from the authority plus ten per cent a year from the date of said original purchase up to the time of repurchase or the fair market value at the time of repurchase, whichever is lower, plus the fair market value of the improvements; provided that title to a dwelling unit and the property or lease may pass to a family member by devise or through the law of descent, notwithstanding any qualifications set forth in section 516-33 or the rules and regulations established by the authority.

At the time of the repurchase, the fair market value of the land and the improvements shall be determined by a qualified appraiser, selected by the purchaser from a list of three appraisers provided by the authority, whose services shall be paid for by the authority; provided that the appraisal is subject to review by the authority prior to acceptance. If the purchaser disagrees with the value, he may appoint his own appraiser at his own cost and any further disagreement on the value may be resolved by negotiation or otherwise.

(b) Within sixty days after the receipt of the notice the authority shall in writing notify the purchaser at the address so specified whether it elects to exercise its option. The date of election to purchase shall constitute the date of valuation for repurchase. Nonpayment of the purchase price by the authority within ninety days from the date of election shall constitute a default and shall void the election and terminate the right to exercise the option by the authority. If the authority refuses, or fails within the sixty-day period to reply to the offer, the purchaser may sell the fee simple interest in the property, or lease the property for a period not to exceed one year, to any person, free from any price restrictions; provided that, if the purchaser leases the property, the purchaser shall, upon expiration of the term of the lease, again comply with the requirements of subsection (a) whenever the expiration date of the term of the lease is within the ten-year period stated in subsection (a); further provided that, if the purchaser notifies the authority of his intention to sell the property, but does not

sell or lease the property within two years after the date the notice was received by the authority, the purchaser must again comply with the requirements of subsection (a) if the ten-year period stated in subsection (a) has not expired.

(c) The authority may lease, rent, or resell, any lot and improvements purchased by it under this part.

(d) Any original lease, deed, agreement of sale, mortgage, and other instruments of conveyance issued by the authority under this part shall expressly contain the restriction on sale and use of the residential lot as prescribed by this section. [L 1967, c 307, § 24; HRS § 516-35; am L 1975, c 184, § 2(15); am L 1976, c 242, § 3]

[§ 516-35.1] Foreclosure and sale by mortgages. If the leased fee, fee simple title or lease to a lot, purchased or acquired from the Hawaii housing authority under this chapter is secured by a mortgage held by a lending institution authorized to do business as a lending institution either in the State or elsewhere in the United States, upon foreclosure of the mortgage, the leased fee, the fee simple title or the lease may be sold to any purchaser, including the holder of the mortgage, without regard to whether or not the purchaser is qualified under the provisions of this chapter to own or otherwise acquire the leased fee, the fee simple title, or the lease. The mortgage so held, and the interest so acquired by the purchaser on such foreclosure, shall be freely assignable, notwithstanding the provisions of section 516-35. The term, "lending institution," includes an insurer or guarantor of the obligation or condition of the mortgage, including the Federal Housing Administration, the Federal National Mortgage Association, the Veterans Administration, or any other federal agency and their respective successors and assigns or any lending institution authorized to do business in the State or elsewhere in the United States; provided, that the rights and powers of nongovernmental holders of mortgages shall not be any greater than those of the aforementioned federal agencies.

Notwithstanding any provision in this chapter to the contrary, in sales by the authority of the leased fee or the fee

simple title, or in leases of lots, the authority may waive or modify any restrictions contained in this chapter, if such waiver or modification is necessary to enable any of aforementioned federal agencies or any lending institution authorized to do business in the State or elsewhere in the United States to participate in any loan secured by a mortgage on the leased fee, the fee simple interest or the lease; provided any such waiver or modification shall not confer any greater rights or powers in the holder than those which would be required by the Federal Housing Administration. [L 1968, c 46, § 2i]

§§ 516-36 to 39 REPEALED. L 1975, c 184, § 2(16).

§ 516-40 Bonds as legal investments. The State and all of its public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, including savings and loan associations, all investment companies, insurance companies, insurance associations, and other persons carrying on an insurance business in the State, and all personal representatives, guardians, trustees, and other fiduciaries in the State may legally invest moneys or funds belonging to them or within their control and available for investment under other provisions of law, in any bonds or other obligations issued by the Hawaii housing authority under this part, and such bonds and other obligations of the authority shall be authorized security for all public deposits and shall be fully negotiable in the State. It is the purpose of this section to authorize any of the foregoing to use any funds owned or controlled by them, including (but not limited to) sinking, insurance, investments, retirement, compensation, pension, and trust funds and funds held on deposit, for the purchase of any such bonds or other obligations; provided that nothing contained in this section shall operate to relieve any person, firm, or corporation from liability for failure to exercise reasonable care in selecting investments or, in the case of a guardian or trustee, from liability for failure to exercise the judgment and care to observe the duties required of a guardian or trustee by sections 406-22 and 554-6. [L 1967, c 307, § 29; HRS § 516-40; am L 1976, c 200, pt of § 1]

§ 516-41 Exemption from taxation and assessments. The Hawaii housing authority and the property acquired by it under this part, if not leased or sold, are exempt from any and all taxes and assessments. Bonds, notes, debentures, and other evidences of indebtedness issued by the authority are declared to be issued for a public purpose and to be public instrumentalities and, together with interest thereon, shall be exempt from taxes. [L 1967, c 307, § 30]

§ 516-42 Investment of reserves. The Hawaii housing authority may invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control. No provisions with respect to the acquisition, operation, or disposition of property by other public bodies are applicable to the authority under this part unless otherwise specifically provided by law. [L 1967, c 307, § 31]

§ 516-43 Security for funds deposited. The Hawaii housing authority may, by resolution, provide that all moneys deposited by it shall be secured: (1) by any securities by which funds deposited by the state director of finance may be legally secured as provided in section [38-3], or (2) by an undertaking with such sureties as are approved by the authority faithfully to keep and pay over upon the order of the authority any such deposits and agreed interest thereon, and all banks and trust companies may give any such security for such deposits. [L 1967, c 307, § 32]

§ 516-44 Fee simple residential revolving fund. A fee simple residential revolving fund is hereby created. The funds appropriated for the purposes of this chapter and all moneys received or collected by the Hawaii housing authority under this chapter shall be deposited in the revolving fund. The proceeds in the funds shall first be used to pay the principal and interest on bonds or other indebtedness issued by the authority, or by the State, and then for necessary expenses of the authority in administering this part. [L 1967, c 307, § 33; HRS § 516-44; am L 1971, c 215, § 3]

§ 516-45 General obligation bonds. The director of finance may, from time to time, issue general obligation bonds in such amounts as may be authorized by the legislature, for the purpose of acquisition by the Hawaii housing authority of residential houselots within development tracts pursuant to chapter 516, part II or for the acquisition of suitable properties to exchange pursuant to section 516-24.5 or for the acquisition by the department of land and natural resources under section 171-50.1 of suitable properties for exchange pursuant to section 171.50.2 to effectuate the purpose of this chapter. The principal and interest of general obligation bonds issued pursuant to this section shall be reimbursed to the general fund from the fee simple residential revolving fund as provided in section 516-44. Pending the receipt of funds from the issuance and sale of general obligation bonds, amounts required within the limits of legislative authorization may be advanced to the Hawaii housing authority from the general fund of the State. Upon the receipt of the bond funds, the general fund shall be reimbursed the amount advanced. [L 1971, c 215, § 4; am L 1975, c 184, § 2(17)]

§ 516-51 Preliminary negotiation required. (a) Upon the filing of a petition by the number of lessees required by section 516-22 with the Hawaii housing authority, the authority shall request the lessor and the lessees or their designated agents to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development tract. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the authority and the authority may use the information in determining, prior to commencing condemnation proceedings, the probability that lessees will be able to meet the financial requirements of section 516-33(4).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or

eminent domain. [L 1976, c 242, pt of § 4; am L 1980, c 107, pt of § 3]

§§ 516-52 to 55 REPEALED. L 1980, c 107, § 4.

PART III. RIGHTS OF LESSEES

§ 516-61 Applicability. Except as otherwise expressly provided, this part applies to all leases of residential lots existing and in force on June 24, 1967, and to all leases of residential lots executed thereafter.

Notwithstanding any term, condition, or provision in any lease to the contrary, the lessee of a residential lot shall have all of the rights enumerated in this part. [L 1967, c 307, § 34; HRS § 516-61; am L 1968, c 46, § 2j]

§ 516-62 Discrimination. No person shall be denied the right to become a lessee of a residential lot, because of his race, religion, sex, ancestry, or a physical handicap. [L 1967, c 307, § 35; HRS § 516-62; am L 1976, c 159, § 8]

§ 516-63 Free assignability. Except as otherwise provided in section 516-35, a lessee may assign his lease at any time without the approval or consent of the lessor, and the assignee shall have the same rights and obligations under the lease as the original lessee; provided, that no such assignment shall be effective to transfer any interest in the lease unless the lessor has received (1) either a true executed copy of such assignment or written notice thereof, (2) a reasonable service charge, except in case of an assignment by way of mortgage or assignment to or by the Federal Housing Administration or Veterans Administration or the Federal National Mortgage Association or a foreclosure of mortgage or assignment in lieu of foreclosure, and (3) the written undertaking of the assignee to perform all obligations of the lessee under the lease, which undertaking may be incorporated in such assignment. No such assignment shall release the assignor from liability under the lease unless the lessor consents in writing to the assignment. A consent to the assignment shall be deemed a consent to the release of the assignor from liability under the lease. The lessor shall not require payment of any money for his consent except the service charge, nor withhold such consent unreasonably.

Any person acquiring the leasehold estate in consideration of the extinguishment of a debt secured by mortgage of the lease or through foreclosure sale, judicial or otherwise, shall be liable to perform the obligations imposed on the lessee by the lease only during the period such person has possession or ownership of the leasehold estate. [L 1967, c 307, § 36; HRS § 516-63; am L 1968, c 46, § 2k]

§ 516-64 Forfeiture. No forfeiture of the lessee's interest in a leasehold shall be declared by the lessor for the lessee's failure to pay the rent or otherwise to perform his obligations under the lease, unless the lessor has given written notification to the lessee of the default and has given the lessee at least thirty days within which to correct the default. [L 1967, c 307, § 37]

§ 516-65 Extension. From time to time during the first twenty years of the term of any lease, the lessee shall have the right to extend the lease term to fifty-five years, commencing on the first day of the calendar month in which the lessee gives written notice thereof to the lessor, subject to the following conditions:

(1) At the time the right to extend the lease is exercised, the unexpired term of the lease is less than fifty years;

(2) The extension is for the purpose of mortgaging the leasehold interest;

(3) The lessee is not then in default in any respect under the lease; and

(4) The notice is accompanied by payment of a reasonable service charge.

This section applies only to leases executed and effective subsequent to June 24, 1967. [L 1967, c 307, § 38]

§ 516-66 Lease rental. In every case of an extension under section 516-65 the annual lease rental during the first thirty years shall not exceed an amount determined as follows:

(1) Compute to nearest whole year, one hundred per cent of the unexpired period of fixed rent at the commencement of the extended term;

(2) Multiply the number of years computed in (1) by the fixed annual rent in effect immediately prior to the extension.

(3) Deduct from thirty years the number of years computed in (1) and multiply that difference by the annual rent determined by mutual agreement of lessor and lessee within thirty days after such extension or by arbitration in accord with chapter 658; and

(4) Add the amounts computed in (2) and (3) and divide that sum by thirty. This sum rounded to the nearest dollar shall be the annual rent for the first thirty years of the extended term; provided that such rent shall not without the consent of the lessor be less than the annual rent in effect immediately prior to such extension.

The annual rent payable hereunder for and during the remaining period of the extended term shall be determined by mutual agreement of the lessor and the lessee, or if they fail to reach such agreement at least ninety days before the commencement of the period, by arbitration in accordance with chapter 658. [L 1967, c 307, § 39; HRS § 516-66; am L 1975, c 184, § 2(18)]

§ 516-67 Zoning changes. A lessor, fee owner, or any legal or equitable owner applying for a change in zoning in any area shall notify all of his lessees within three-fourths miles of the land proposed to be rezoned of the application and its contents at least thirty days before filing the same before any public zoning authority. [L 1967, c 307, § 40]

§ 516-68 Rights to self-organization; remedies. Lessees in a development tract shall have the right of self-organization and the right to form, join, or assist each other in forming associations for their mutual benefit or to select representatives of their choosing to engage in bargaining with their lessor or to secure other mutual aid or protection as may be necessary or desirable with respect to their respective leasehold interests. No lessor or agent of the lessor shall interfere with, restrain, or coerce any lessee in the exercise of the rights granted by this

section or dominate or attempt to contral the formation of any such organization. Neither the lessor nor the organization or the duly authorized representative of a majority of the lessees shall refuse to bargain collectively in good faith with each other. In the event of any such refusal or violation of this section, either party may file a complaint with the Hawaii housing authority, and the authority, after due notice of hearing and hearings, may issue such cease and desist orders as shall be meet and just in the light of the evidence adduced. [L 1967, c 307, § 41]

§ 516-69 Sale of fee by lessor. No fee owner of any residential lot under lease shall sell the leased fee interest to the lot to any third party unless he has first given a written thirty-day notice to the lessee and the authority of such intention. [L 1967, c 307, § 42]

§ 516-70 Reversion of improvements. (a) This section applies to all leases of residential lands as defined by section 516-1(5).

(b) At the termination of any lease, or at the expiration of the lease term, the lessee may, if not then in default under the terms of his lease, remove all onsite improvements on the lot which were constructed at the cost of, or otherwise paid for by, the lessee, without compensating the lessor therefor. If the lessee notifies the lessor in writing within sixty days before the termination or expiration that he declines to remove such onsite improvements and if the lessee is not then in default under the terms of his lease, and if the lessor refuses to extend the term of the existing lease or to issue a new lease for a term of at least thirty years at a rental that is mutually agreeable to the parties or failing such agreement that is determined by arbitration pursuant to chapter 658, the lessor shall be required to compensate the lessee for the current fair market value of all such onsite improvements. Such improvements shall be appraised at the expense of the lessee. The appraiser selected shall be by mutual agreement of the lessee and the lessor or in conformance to chapter 658. The compensation shall be determined by mutual agreement or in conformity with chapter 658,

and the compensation shall be paid within thirty days of determination. Such expense of arbitration shall be equally shared by both parties. [L 1967, c 307, § 43; HRS § 516-70; am L 1975, c 184, § 2(19)]

PART IV. JUDICIAL DECLARATION

§ 516-81 REPEALED. L 1975, c 184, § 2(20).

[§ 516-82] Severability. If any part, section, sentence, clause, or phrase of this chapter, or its application to any person or transaction or other circumstances, is for any reason held to be unconstitutional or invalid, the remaining parts, sections, sentences, clauses, and phrases of this chapter, or the application of this chapter to other persons or transactions or circumstances, shall not be affected. The legislature hereby declares that it woud have passed this chapter and each part, section, clause, or phrase thereof, irrespective of the fact that any one or more parts, sections, sentences, clauses, or phrases of this chapter, or its application to any person or transaction or other circumstance, be declared unconstitutional or invalid. [L 1975, c 184, § 2(21)]

[§ 516-83] Legislative findings and declaration of necessity; purpose. (a) The legislature finds that:

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are

situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

(4) The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State;

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the

welfare of all people of the State by improving their standard of living.

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few.

(9) Land, in common with other natural resources, is of finite quantity; a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artifically inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking

inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii.

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the proverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is

possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter.

(12) The use of the power to eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose;

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefore by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State. [L 1975, c 186, § 2]

For additional legislative findings and declaration, see L 1975, c 184, § 1].

APPENDIX H

HAW. SESS. LAWS 1967

ACT 307 S.B. 1128.

A Bill for an Act Relating to Residential Leaseholds, the Acquisition by the State Through Condemnation of Lands in Fee Simple and the Disposition Thereof, and the Rights of Lessees.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

GENERAL PROVISIONS

SECTION 1. **Findings and declaration of necessity.** The legislature finds that:

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

"All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . . ."

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few

of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The terms and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple

property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

The legislature declares as a matter of legislative determination that:

[Sections 2-46, omitted.]

APPENDIX I

HAW. SESS. LAWS 1975

ACT 184

S.B. NO. 1200

A Bill for an Act Relating to Residential Leaseholds.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purpose.** The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development has been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

(1) The scarcity of fee simple residential lands have pushed the price of fee simple residential units to high levels;

(2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

(3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

(4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;

(5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run; and

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for or will be paid for by the lessee and on the value accruing thereon;

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at $68,000 before renegotiation of lease rental was increased), causing lessees opting to

dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

[Sections 2-6, omitted.]

APPENDIX J

HAW. SESS. LAWS 1975

ACT 185 H.B. NO. 55

A Bill for an Act Relating to the Hawaii Lease Rent Renegotiation Relief Act.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purposes.** The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use

but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership "is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical".

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially

increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold

residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at $68,000 before renegotiation of lease rent has been appraised at $59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated above, the public health, safety, and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

[Sections 2-5, omitted.]

APPENDIX K

HAW. SESS. LAWS 1975

ACT 186 S.B. NO. 1543

A Bill for an Act Relating to Residential Leaseholds and the Acquisition by the State Through Condemnation of Lands in Fee Simple and Disposition Thereof.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purpose.** Act 307, Session Laws of Hawaii 1967, now Chapter 516. Hawaii Revised Statutes, was intended to lessen the adverse consequences of the excessive concentration of the fee title to lands in Hawaii in the hands of a few owners by allowing residential leaseholders to acquire the fee simple title absloute or otherwise, to real property they were leasing.

The legislature finds that although the Act has been in full effect for nearly six years it has not been implemented. Many reasons have been cited for the failure to put the Act into effect including possible legal or constitutional difficulties inherent in the original Act.

The purpose of this Act is to reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307 and to amplify and clarify those findings and declarations of necessity.

SECTION 2. Chapter 516. Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read:

"**Sec. 516. Legislative findings and declaration of necessity; purpose.** (a) The legislature finds that:

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have

instead engaged in the practice of leasing their lands under long-term leases:

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State:

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land:

(4) The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands:

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State:

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of

living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living:

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values:

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few:

(9) Land, in common with other natural resources, is of finite quantity: a fact particularly obvious in Hawaii.

In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artifically inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this Act is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii:

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this Act:

(12) The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose:

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who

is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State."

[Sections 3-4, omitted.]

APPENDIX L

HAWAII REVISED STATUTES

CHAPTER 101

EMINENT DOMAIN

PART I. CONDEMNATION OF PRIVATE PROPERTY

SECTION

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PART 1. CONDEMNATION OF PRIVATE PROPERTY

§ 101-1 Definitions. In this part, except where the context otherwise requires:

(1) "County" means a county (except the county of Kalawao) and any agency of a county, including the board of water supply thereof, duly authorized to exercise the power of eminent domain.

(2) "Plaintiff" means the State or any county or the public utility or other authority duly authorized to exercise the power of eminent domain.

(3) "State" means the State or any agency of the State duly authorized to exercise the power of eminent domain. [L 1951, c 12, § 1(a); RL 1955, § 8-1]

§ 101-2 Taking private property for public use; disposal of excess property. Private property may be taken for public use. Private property may also be taken by the State or any county in excess of that needed for such public use in cases

where small remnants would otherwise be left or where other justifiable cause necessitates such taking to protect and preserve the contemplated improvement, or public policy demands such taking in connection with the improvement, in which case the condemning authority may sell or lease such excess property, with such restrictions as may be dictated by considerations of public policy in order to protect and preserve such improvements; provided, that in the disposal of any such excess property, if such property is less than the minimum lot size requirements of the applicable zoning regulations, is of a configuration or topography which in the judgement of the appropriate county zoning authority cannot be put to a reasonable use in accordance with the applicable zoning regulations, or lacks proper access to a street, it shall be offered to the owner or owners of the abutting land for a reasonable price based on an appraisal; provided further, that if such excess property conforms to said minimum lot size requirements, is of a configuration and topography which in the judgment of the appropriate county zoning authority can be put to a reasonable use in accordance with the applicable zoning regulations and has proper access to a street, then the State or the county, as the case may be, may sell such property at public auction. If there is more than one abutting owner who is interested in purchasing any such excess property which is less than the minimum lot size requirements of the applicable zoning regulations, is of a configuration or topography which in the judgment of the appropriate county zoning authority cannot be put to a reasonable use in accordance with applicable zoning regulations, or lacks proper access to a street, it shall be sold by the condemning authority by sealed bid to the abutting owner submitting the highest offer above the appraised value; provided further, that if any such excess property abuts more than one parcel, the condemning authority may make application for subdividing such property so that a portion thereof may be sold to each abutting owner at the appraised value if the public interest is best served by such subdivision and disposal. All moneys received from the sale or lease of such excess property shall be paid into the fund or appropriation

from which money was taken for the original condemnation and shall be available for the purposes of such fund or appropriation. [L 1896, c 45, § 1; am L 1909, c 10, § 1; RL 1925, § 808; am L 1925, c 59, § 1; RL 1935, § 50; am L 1941, c 149, § 1; RL 1945, § 301; am L 1945, c 185, § 1; am L 1951, c 12, § 1(b); RL 1955, § 8-2; HRS § 101-2; am L 1975, c 110, § 1; am L 1976, c 7, § 1]

§ 101-3 Entry upon private property by agreement. In the event the State or a county thereof enters upon privately owned real property by authority of an agreement to acquire the real property either by voluntary action of the parties or by condemnation, the State or county is required to:

(1) Reduce the agreement in writing;

(2) File the executed written agreement promptly in the bureau of conveyances;

(3) Complete its part of the agreement, including payment in full of any money, within the period of two years immediately succeeding the date upon which the agreement is filed.

If the State or county does not so complete its part of the agreement, the State or county shall pay to the property owner, in addition to the sum due, interest of six per cent a year on the sum due commencing with the end of the term of two years, and the property owner may bring suit against the State or any county to recover the sum together with interest. [L 1953, c 108, § 1; RL 1955, § 8-3]

§ 101-4 Right of eminent domain granted to public utilities and others. The right and power of eminent domain is hereby granted to every person, operating a public utility, and engaged in the transportation of passengers or freight or any commodity by rail or bus, or by any other means, or the conveyance or transmission of telephone messages, or the production, conveyance, transmission, delivery, or furnishing of electricity, power, water, gas, or oil, within the State, as well as to corporations designated in section 101-41. The right and power shall be exercised only in compliance with, and under, the

conditions and procedures set forth in this part. [L 1896, c 45, § 6; RL 1925, § 809; RL 1935, § 51; RL 1945, § 302; am L 1951, c 12, § 1(c); RL 1955, § 8-4]

§ 101-5 Fee simple or lesser estate may be acquired. In the taking of private property for a public use, a fee simple estate or any lesser estate may be acquired. [L 1896, c 45, § 2; RL 1925, § 810; RL 1935, § 52; RL 1945, § 303; am L 1951, c 12, § 1(d); RL 1955, § 8-5]

§ 101-6 What property may be taken. Property which may be taken by virtue of this part includes all real estate belonging to any person, together with all structures and improvements thereon, franchises or appurtenances thereunto belonging, water, water rights, and easements of every nature. [L 1896, c 45, § 3; am L 1898, c 62, § 1; RL 1925, § 811; RL 1935, § 53; RL 1945, § 304; am L 1951, c 12, § 1(e); RL 1955, § 8-6]

§ 101-7 Superior public use. Property already appropriated to some public use may be taken by the State or a county in the manner and under the conditions provided by part III. An easement over, across or under property not owned by the State or a county and devoted to public use may be taken by any other person enjoying the right of eminent domain where such taking will not substantially impair the use for which the property has previously been appropriated. [L 1951, c 12, § 1(f); RL 1955, § 8-7]

§ 101-8 Entering and surveying land. Any agent or servant of a plaintiff may, for the purpose of locating or surveying land to be condemned in accordance with this part, enter upon the land and make examinations and surveys. The entry shall not constitute a cause of action in favor of the owner of the land, except for damages resulting from wilful acts or negligence on the part of the agent or servant. [L 1896, c 45, § 7; am L 1917, c 108, § 1; RL 1925, § 812; RL 1935, § 54; RL 1945, § 305; am L 1951, c 12, § 1(g); RL 1955, § 8-8]

§ 101-9 Actions; priority. In all actions brought under this chapter, to enforce the right of eminent domain, all courts shall

give the actions preference over all other civil actions in the matter of setting the actions for hearing or trial, and in hearing them, to the end that all the actions shall be quickly heard and determined. [L 1959, c 18, § 1; Supp, § 8-8.5]

§ 101-10 Circuit courts have jurisdiction. The circuit courts shall try and determine all actions arising under this part, subject only to an appeal to the supreme court in accordance with law. The court may on its own motion or on motion of any party try and determine any issue in the case in advance of other issues. [L 1896, c 45, § 5; RL 1925, § 813; RL 1935, § 55; RL 1945, § 306; am L 1947, c 200, § 1(a); RL 1955, § 8-9]

§ 101-11 Procedure as in civil actions. Except as otherwise expressly provided in this part, the procedure shall be the same as in other civil actions. [L 1896, c 45, § 20; RL 1925, § 814; RL 1935, § 56; RL 1945, § 307; RL 1955, § 8-10]

§ 101-12 Evidence. In addition to rules of evidence otherwise provided by law, sections 246-40 and 246-46 shall apply to all proceedings brought under this part. [L 1963, c 143, § 4; Supp, § 8-10.1]

§ 101-13 Exercise of power by county. Whenever any county deems it advisable or necessary to exercise the right of eminent domain in the furtherance of any governmental power, the proceedings may be instituted as provided in section 101-14 after the governing authority (county council, or other governing board in the case of an independent board having control of its own funds) of the county has authorized such suit by resolution duly passed, or adopted and approved, as the case may be. The resolution, in the case of the city and county of Honolulu or an independent board thereof, shall after its introduction, be published in a daily newspaper with the ayes and noes, once (Sundays and legal holidays excepted) at least three days before final action upon it, and in the case of any other county or an independent board thereof, be published in a newspaper with the ayes and noes, at least one day (Sundays and legal holidays excepted), before final action upon it. [L

1919, c 63, § 1; am L 1923, c 48, § 1; RL 1925, § 815; am imp L 1933, c 98, § 2; RL 1935, § 57; RL 1945, § 308; am L 1951, c 12, § 1(h); RL 1955, § 8-11]

§ 101-14 Plaintiff. The attorney general of the State may, at the request of the head of any department of the State, or as otherwise provided by law, institute proceedings for the condemnation of property as provided for in this part. Any county may institute proceedings in the name and on behalf of the county for the condemnation of property within the county for any of the purposes provided in this part which are within the powers granted to the county. [L 1896, c 45, § 4; am L 1917, c 108, § 2; RL 1925, § 816; RL 1935, c 58; RL 1945, § 309; am L 1947, c 200, § 1(b); am L 1951, c 12, § 1(i); RL 1955, § 8-12]

§ 101-15 Complaint; defendants. Actions under and by virtue of this part, shall be commenced by filing a complaint and issuing a summons thereon. All persons who are owners or claimants of the property sought to be condemned shall be joined as defendants. In case the owner or claimant is unknown to plaintiff, it shall be sufficient if the complaint includes a statement of that fact, and the defendant may be joined in the complaint under a fictitious name. In the event there is a class of persons owning or claiming some interest in the property sought to be condemned, who are too numerous to be served by personal service of the summons, or who would have to be ascertained by examination into the possible claims of a group of persons too numerous to permit identification of the defendants, the complaint may include a statement of that fact and the defendants may be joined in the complaint by describing them as a class, and in such case it shall be unnecessary to state in the complaint that the owners or claimants are unknown to the plaintiff. [L 1896, c 45, pt of § 8; RL 1935, pt of § 59; am L 1941, c 38, § 1; RL 1945, pt of § 310; RL 1955, § 8-13]

§ 101-16 Complaint; additional contents; map. The complaint shall also contain a statement of the use to which the land sought to be condemned is to be put, a description of each

and every piece of land sought to be condemned, and whether the same includes the whole or only a part of an entire tract or parcel. A map shall accompany the complaint which shall correctly delineate the land sought to be condemned and its location. [L 1896, c 45, pt of § 8; RL 1945, pt of § 310; RL 1955, §8-14]

§ 101-17 Different properties in one action. All property necessary for any public use may be united in one action. [L 1896, c 45, § 10; RL 1945, pt of § 310; RL 1955, § 8-15]

§ 101-18 Joint or consolidated actions by governmental agencies. Whenever two or more parcels of real property, or different interests in the same parcel of real property or improvements on real property or personal property in connection therewith, are to be acquired by eminent domain proceedings by two or more governmental agencies, and the properties to be so acquired are contiguous or are so interrelated that the taking of one of the properties or interests by one agency or the improvement contemplated in connection with the taking may affect the amount of the award which may be adjudged for the other of the properties, or vice versa, proceeding for the taking may be consolidated or the taking may be effected in one action brought in the name of one or more of the governmental agencies concerned in the taking pursuant to an agreement between the agencies. In such case the awards, when made, shall be apportioned in such manner as is agreed upon between the agencies, or, if not determined by agreement, that the apportionment shall be made by the court in such manner as it deems equitable, based upon the evidence given in the action or upon the same and such additional evidence as may be necessary or proper to determine the apportionment.

As used in this section, the term "governmental agency" includes the State, and any county, and any department, division, board, commission, public corporation, or other agency or instrumentality of the State or of any county.

Notwithstanding any other provision of law to the contrary, any governmental agency having by law the power to acquire any properties by the exercise of the power of eminent domain,

may enter into agreements with any other governmental agency to effect the consolidation or to join in one action for the acquisition of the properties as provided in this section. [L 1953, c 147, §§ 1-3; RL 1955, § 8-16]

§ 101-19 Amendments of complaints, citations. In all proceedings under this part the court shall have power at any stage of the proceeding to allow amendments in form or substance in any complaint, citation, summons, process, answer, motion, order, verdict, judgment, or other proceeding, including amendment in the description of the lands sought to be condemned, whenever the amendment will not impair the substantial rights of any party in interest [L 1937, c 184, § 1; RL 1945, pt of § 310; RL 1955, § 8-17]

§ 101-20 Notice. When the owner or claimant of the land sought to be condemned is known, the summons shall be served by delivering to him, or to an agent authorized by appointment or by law to receive service of process, a certified copy thereof, together with a copy of the plaintiff's complaint. If the owner or claimant, although known, was never a resident of the State or has removed therefrom or cannot for any reason be served with process within the State, or if the owner or claimant is unknown, then the service of the summons upon the owner or claimant may be made in the manner provided by sections 634-23, 634-24, and 634-26. If the defendants are joined in the complaint by describing them as a class, then the service of the summons upon the defendants may be made by publication in a newspaper of general circulation in the county in which the property is situated, in the manner provided by sections 634-23(3) and 634-26, and by giving such further notice as the court may order. The service of summons, as provided for in this section, shall be sufficient to give the court jurisdiction to proceed with and finally determine the case. [L 1896, c 45, § 9; RL 1925, § 818; RL 1935, § 60; am L 1937, c 184, § 2; am L 1941, c 38, § 2; RL 1945, § 311; RL 1955, § 8-18; am L 1959, c 19, § 1; HRS § 101-20; am L 1973, c 30, § 1]

§ 101-21 Intervenors. Any person in occupation of or having any claim or interest in any property sought to be condemned or in the damages for the taking thereof though not named in the complaint, may appear, plead, and defend in respect to his own property or interest, in like manner as if named in the complaint. [L 1896, c 45, § 11; RL 1925, § 819; RL 1935, § 61; RL 1945, § 312; RL 1955, § 8-19]

§ 101-22 Decision. The court may determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the property. [L 1896, c 45, § 12; RL 1925, § 820; RL 1935, § 62; RL 1945, § 313; RL 1955 § 8-20]

§ 101-23 Damages assessed, how. In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned with all improvements thereon shall be assessed, and if any of the improvements are separately owned, the value thereof shall be separately assessed. If the property sought to be condemned constitutes only a portion of a larger tract, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed, and also how much the portion not sought to be condemned will be specifically benefited, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the amount of compensation assessed for the property taken, and for damages by reason of its severance from another portion of the same tract, then the owner shall be allowed no compensation, but if the benefits shall be less than the amount so assessed as damages or compensation, then the former shall be deducted from the latter and the remainder shall be the amount awarded as compensation or damages. In case of the exercise of the power of eminent domain by the city and county of Honolulu in furtherance of any governmental power under section 70-111 and the improvement ordinance of the city, the amount of damages or compensation assessed, or

awarded, or agreed upon in any compromise approved by motion of the city council shall in no case be construed as limiting or affecting the power of the city council to distribute any portion of the cost upon any property found to be benefited thereby proportioned as provided by law in the exercise of their judgment whether under an improvement district or frontage improvement created before or after the acquisition of any such land. If condemnation is for the purpose of widening or realigning any existing highway or other public road, the owner of the property condemned shall be entitled to full compensation for the property actually taken and special benefits shall be considered only insofar as the value of the benefits shall not exceed the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff. That is, if the special benefits shall be equal to the severance damages, then the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the special benefits shall be less than the severance damages, then the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the land taken. [L 1896, c 45, § 13; am L 1919, c 63, § 2; RL 1925, § 821; RL 1935, § 63; RL 1945, § 314; am L 1947, c 200, § 1(c); am L 1953, c 269, § 1; RL 1955, § 8-21]

§ 101-24 Assessed as of day of summons. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of summons, and, except as provided in section 46-6, its actual value at that date shall be the measure of valuation of all property to be condemned, and the basis of damage to property by reason of its severance from the portion sought to be condemned, subject, however, to section 101-23.

No improvement put on the property subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages. [L 1896, c 45, § 15, pt of § 16; RL 1925, § 822; RL 1935, § 64; RL 1945, § 315; RL 1955, § 8-22; am L 1959, c 19, § 2]

§ 101-25 Payment of judgment, penalties. The plaintiff shall within two years after final judgment pay the amount assessed as compensation or damages and upon failure so to do all rights which may have been obtained by the judgment shall be lost to the plaintiff; and if such payment is delayed more than thirty days after final judgment, then interest shall be added at the rate of five per cent a year. The payment shall be made to the clerk of the court rendering the judgment. The plaintiff shall within thirty days after the payment deposit in the mails of the United States a written notice addressed to the defendants, who have filed answers or appeared in court in the proceedings, or to their attorneys of record in the proceedings, if so represented, at their last known address, that the payment has been made, and the clerk of the court shall distribute the payment to those entitled thereto in accordance with the order of the court. If the plaintiff fails to make the payment as aforesaid, the defendant shall be entitled to recover judgment as provided in section 101-27. If the plaintiff fails to give written notice of the payment as aforesaid, interest shall be added on the amount thereof at the rate of five per cent a year until the written notice is placed in the mails or until the defendant receives from the clerk of court the amount to which he is entitled under the terms of the order of court, whichever event shall first occur. [L 1896, c 45, § 17; RL 1925, § 823; RL 1935, § 65; am L 1937, c 184, § 3; am L 1941, c 55, § 1; RL 1945, § 316; am L 1951, c 12, § 1(j); RL 1955, § 8-23]

§ 101-26 Final order of condemnation. When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of the condemnation, a certified copy of which shall be filed and recorded in the office of the registrar of conveyances, and thereupon the property described shall vest in the plaintiff. [L 1896, c 45, § 18; RL 1925, § 824; RL 1935, § 66; RL 1945, § 317; RL 1955, § 8-24]

§ 101-27 Defendant allowed damages upon abandonment or dismissal of proceedings. Whenever any proceedings instituted under this part are abandoned or discontinued before

reaching a final judgment, or if, for any cause, the property concerned is not finally taken for public use, a defendant who would have been entitled to compensation or damages had the property been finally taken, shall be entitled, in such proceedings, to recover from the plaintiff all such damage as may have been sustained by him by reason of the bringing of the proceedings and the possession by the plaintiff of the property concerned if the possession has been awarded including his costs of court, a reasonable amount to cover attorney's fees paid by him in connection therewith, and other reasonable expenses; and the possession of the property concerned shall be restored to the defendant entitled thereto. Issues of fact arising in connection with any claim for such damage shall be tried by the court without a jury unless a trial by jury is demanded by either party, pursuant to the rules of court, within ten days from the date of the entry of an order or judgment allowing the discontinuance of the proceedings, or dismissing the proceedings or denying the right of the plaintiff to take the property concerned for public use. In the event judgment is entered in favor of the defendant and against the plaintiff, any moneys which have been paid, and any additional security which has been furnished, by the plaintiff to the clerk of the court under sections 101-28 and 101-29, shall be applied or enforced toward the satisfaction of the judgment. In the case of the State or a county, if the moneys so paid to the clerk of the court are insufficient, then the balance of such judgment shall be paid from any moneys available or appropriated for the acquisition of the property concerned, or if that is insufficient then the same shall be paid from the general fund of the State or county, as the case may be. [L 1929, c 230, § 1; RL 1935, § 67; am L 1937, c 184, § 4; RL 1945, § 318; am L 1951, c 12, § 1(k); RL 1955, § 8-25; HRS § 101-27; am L 1973, c 30, § 2]

§ 101-28 Possession pending action; immediate occupation by plaintiff. At any time after the service of summons the court may, upon motion of the plaintiff and upon notice to the

defendant, issue an order putting the plaintiff in possession of the land sought to be condemned and permitting the plaintiff to do such work thereon as may be required for the purpose for which the taking of the land is sought. The motion shall contain a statement of the reasons for requiring an immediate occupation of the land sought to be condemned and a statement of the sum of money estimated by the plaintiff to be just compensation or damages for the taking of the land. Upon the filing of the motion the court shall issue an order directed to the defendants and returnable not more than twenty days from the date of the filing of the motion, requiring the defendants to appear and show cause why the motion should not be granted. The court may require proof by affidavit or otherwise of the right of the plaintiff to maintain the action and of the facts set forth in the motion and shall grant or deny the motion as the public interest and the rights of the parties may require.

Where the plaintiff is not the State or a county, the court may, upon motion of any defendant and good cause shown therefor, require the deposit with the clerk of the court, of such additional amount of money, or of a surety bond approved by the court in such additional amount, as the court deems necessary to reasonably secure the defendant in the collection of the final award which may be made thereafter, taking into consideration the adequacy of the initial estimate, the financial responsibility of the plaintiff and other pertinent circumstances. [L 1937, c 184, pt of § 5; RL 1945, § 319, pt of subs 1; am L 1947, c 200, pt of § 1(d); am L 1951, c 12, pt of § 1(1); RL 1955, § 8-26]

101-29 Possession pending action; alternative procedure. Where the plaintiff is the State or any county, the following alternative procedure may be followed. At any time after the commencement of an action pursuant to this part, the State or any county may file a motion for an order of possession invoking this section and supported by an affidavit alleging, or by oral evidence prima facie showing:

(1) The right of the State or county to maintain the action;

(2) The public use for which the real property sought to be condemned is being taken; and

(3) The sum of money estimated by the State or county to be just compensation or damages for the taking of the real property.

Upon such motion and upon payment of such estimated sum of money to the clerk of the court for the use of the persons entitled thereto, the court shall issue an order ex parte putting the State or county in possession of the real property sought to be condemned and permitting the State or county to do such work thereon as may be required for the purpose for which the taking of the property is sought. The order placing the State or county in possession shall become effective upon the expiration of ten days after service thereof; provided that for good cause shown within ten days, the court may vacate or modify the order or postpone the effective date thereof for an additional period of time. Service of the order shall be made personally on those defendants who are in actual possession, and in other cases may be made by depositing a copy thereof in a United States post office, postage prepaid, registered mail addressed to the defendants at their last known addresses, or to their attorneys of record. [L 1951, c 12, pt of § 1(l); RL 1955, § 8-27]

§ 101-30 Order of possession. No order of possession shall issue unless the plaintiff has paid to the clerk of the court issuing the order, for the use of the persons entitled thereto, the amount of the estimated compensation or damages stated in the motion for the issuance of the order and, in the case of a plaintiff other than the State or a county, has so paid such additional amount, or furnished such additional security, as may be required by the court.

An order of possession issued under section 101-29 shall not become effective until (1) summons in the action has been served personally on the defendants within or without the State, as provided in section 101-20 or section 634-24, or (2) the first publication of the summons directed to the defendants

has occurred and notice has been posted as provided in section 634-23, or (3) the papers mailed to the defendants have been received as provided in section 634-24, or (4) the best notice practicable under the circumstances has been given as ordered by the court for good cause shown. [L 1937, c 184, pt of § 5; RL 1945, § 319, pt of subs 1; am L 1947, c 200, pt of § 1(d); am L 1951, c 12, pt of § 1(l); RL 1955, § 8-28; HRS § 101-30; am L 1973, c 30, § 3]

§ 101-31 Payment of estimated compensation; effect thereof. Upon the application of the parties entitled thereto the court may order that the amount of the estimated compensation or damages stated in the motion and paid to the clerk of the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceedings. If an additional deposit of money has been paid to the clerk of the court pursuant to section 101-28 the amount of the additional deposit or of any portion thereof, shall not, without the consent of the plaintiff, be paid to the party. A payment to any party as aforesaid shall be held to constitute an abandonment by the party of all defenses interposed by him, excepting his claim for greater compensation or damages. If the compensation or damages finally awarded in respect of the land or any parcel thereof exceeds the amount of the money so received by any person entitled, the court shall enter judgment for the amount of the deficiency. The unexpended moneys and any additional security so deposited with the clerk of the court shall be available for, or for enforcement of, the payment of any final judgment awarded by the court. [L 1937, c 184, pt of § 5; RL 1945, § 319, pt of subs 1; am L 1947, c 200, pt of § 1(d); am L 1951, c 12, pt of § 1(l); RL 1955, § 8-29]

§ 101-32 Possession pending appeal. At any time after judgment has been rendered in the circuit court for or in favor of the plaintiff, or pending an appeal to the supreme court by either plaintiff or defendant, the plaintiff, if not already in possession of the land sought to be condemned under an order entered pursuant to sections 101-28 and 101-29, may be put into possession thereof upon the payment to the clerk of the

court of the amount assessed as compensation or damages and such further sum as may be required by the court as a fund to pay any further compensation or damages that may be awarded as well as all damages that may be sustained by the defendant if for any cause the property is not finally taken for public use. Upon such payment, the court shall make an order putting plaintiff into possession of the property sought to be condemned with the right to use the same during the pendency of and until the final conclusion of the litigation. If the plaintiff has appealed to the supreme court, the amount shall be held by the clerk until the entry of final judgment and the final judgment shall include, as part of the just compensation and damages awarded, interest at the rate provided in section 101-25 from the date of the order letting plaintiff into possession as aforesaid. If the defendant who is entitled to the amount of money assessed as compensation or damages and paid into court under this section has appealed to the supreme court, the defendant shall have the right to demand and receive payment of the same at any time thereafter, upon filing a receipt therefor and an abandonment of all defenses to the action or proceeding except as to the amount of compensation or damages that he may be entitled to if a new trial shall be granted. [L 1896, c 45, § 19; RL 1925, pt of § 825; RL 1935, pt of § 68; am L 1937, c 184, pt of § 5; RL 1945, § 319, subs 3; am L 1951, c 12, pt of § 1(l); RL 1955, § 8-30]

§ 101-33 Allowance of interest, etc. If an order is made letting the plaintiff into possession as provided for in sections 101-28, 101-29, and 101-32, the final judgment shall include, as part of the just compensation and damages awarded, interest at the rate provided in section 101-25 from the date of the order until paid by the plaintiff; provided, that except in the case of an appeal by the plaintiff as provided in section 101-32, interest shall not be allowed upon any sum paid by the plaintiff to the clerk of the court from the date of payment. The court may fix and include in the order or judgment the time within which and the terms upon which the parties in possession shall be required to surrender possession to the plaintiff. The court

may make such orders in respect of encumbrances, liens, rentals, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. [L 1896, c 45, pt of § 16; RL 1925, pt of § 825; RL 1935, pt of § 68; am L 1937, c 184, pt of § 5; RL 1945, § 319, subs 3; am L 1951, c 12, pt of § 1(l); RL 1955, § 8-31]

§ 101-34 Issue as to use may be set for immediate trial. If the defendant in his answer, or in return to the order to show cause, issued under section 101-28, denies that the use for which the property sought to be condemned is a public use, or a superior public use within the meaning of section 101-7, the issue may, upon the motion of any party, be set for immediate trial, without a jury and without regard to position on the calendar. Notwithstanding any provision of section 641-1, an interlocutory appeal shall lie from the decision on the issue as of right, and the appeal shall be given precedence in the supreme court. Failure of the defendant to raise the issue within ten days after service of an order granting immediate possession shall be deemed an admission that the use is a public use or a superior public use, as the case may be. [L 1951, c 12, pt of § 1(l); RL 1955, § 8-32; HRS § 101-34; am L 1973, c 30, § 4]

§ 101-35 Tax official as party; certificates, etc. Whenever an eminent domain proceeding is brought by the State or any county for the purpose of acquiring the fee simple estate in real property neither the director of taxation, or any other tax official shall be joined as party respondent merely on account of any lien for real property taxes. The director may intervene in the proceeding as provided by section 101-21. Upon filing the complaint the plaintiff shall furnish a copy thereof to the director and shall also furnish him a copy of any amended complaint. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-33; am L Sp 1959 2d, c 1, § 16]

101-36 Certificate of deposit of moneys in court, notice of lien. If any moneys are paid into court by the plaintiff in the course of an eminent domain proceeding, the plaintiff or its

attorney shall certify the fact of the payment to the director of taxation and shall further certify the date when possession of the land on account of which the payment was made was acquired by the plaintiff, or in the event of entry of a final order of condemnation without previous possession of the land, shall certify the date of the final order of condemnation. A copy of the certificate shall be filed as part of the record in the case. In the event of a final determination granting the application of any party for the payment to him of any of the moneys so paid into court, or if a final order of condemnation is entered then immediately upon receipt of the certificate, the director shall certify to the clerk of the court in which the eminent domain proceeding is pending the amount of real property taxes, penalties and interest constituting a lien upon the land so coming into the possession of the plaintiff, or constituting a lien upon the land which was the subject of the final order of condemnation, as the case may be, and in computing the amount of the lien the director shall cause the taxes due on the parcel of land or portion of a parcel of land so coming into the possession of the plaintiff or made the subject of the final order of condemnation, to be remitted for the balance of the taxation period or year from and after the date of possession or, in the event of entry of a final order of condemnation without previous possession by the plaintiff, from and after the date on which the final order of condemnation was entered, as the case may be. The director or other tax official may remit the taxes in the manner provided by this section upon the receipt of the certificate. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-34; am L Sp 1959 2d, c 1, § 16]

§ 101-37 Payment of taxes out of deposit. The amount of the taxes, penalties, and interest so certified shall be paid to the tax official making the certificate by the clerk of the court from the moneys paid into court, and no clerk shall distribute any moneys so paid into court without the consent of the director of taxation, unless the certificate has been furnished. The clerk shall apportion the tax lien among the parties entitled

to receive the moneys so paid into court in accordance with the direction of the court. Any of the parties may petition the court for determination of the correct amount of taxes, making the director a party to the proceeding. Upon the conclusion of the proceeding the director shall make a new certificate in accordance with the final decision upon the matter, and showing additional penalties and interest, if any. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-35; am L Sp 1959 2d, c 1, § 16]

§ 101-38 Further certificate of possession. In the event possession of any land which is the subject of eminent domain proceedings commenced for the acquisition of the fee simple estate in such lands is obtained by the State or any county, whether or not any moneys are paid into court at the time, the plaintiff or its attorney upon the request of any interested person shall certify the date of the possession to the director of taxation, and upon receipt of the certificate the director, or tax collector and other tax official may remit the taxes in the manner provided in section 101-36. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-36; am L Sp 1959 2d, c 1, § 16]

§ 101-39 Effect of abandonment of eminent domain proceedings. If (1) possession is abandoned at any time prior to the entry of final order of condemnation, or (2) proceedings are abandoned or discontinued before reaching final judgment, or (3) the final judgment does not provide for the taking of the land for public use, or (4) the final order of condemnation is not entered within two years after final judgment, then:

(A) The amount of taxes remitted for the balance of the taxation period or year from and after the event enumerated in items (1), (2), (3), or (4) above shall be restored to the tax lists and tax rolls and shall be deemed delinquent if not paid within ten days after the mailing of notice and demand for payment; and

(B) If the property has not been assessed for taxes in any year by reason of such possession by the plaintiff the

property shall be assessed for taxes in the manner provided for property omitted from taxation, and the taxes due on the property for the balance of the taxation period or year from and after the event enumerated in items (1), (2), (3), or (4) above shall be placed on the tax lists and tax rolls and collected as in the case of property omitted from taxation. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-37]

[Parts II-IV, omitted.]